SUPREME COURT OF THE UNITED STATES.

No. ~~192~~. 79.

MARINE BANK OF CHICAGO, PLAINTIFF IN ERROR,

vs.

THE FULTON COUNTY BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTHERN ILLINOIS.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, before the Hon. Thomas Drummond, judge of the district court aforesaid, and on Monday, the seventh day of July, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh year.

WM. H. BRADLEY, *Clerk.*

FULTON COUNTY BANK
v.
MARINE BANK OF CHICAGO. } Case No. 1.

FULTON COUNTY BANK
v.
MARINE BANK OF CHICAGO. } Case No. 2.

Be it remembered that, on the twenty-first day of April, in the year of our Lord one thousand eight hundred and sixty-two,
2 the said plaintiff, by Smith, Hart & Clyde, its attorneys, came into the clerk's office of the circuit court of the United States for the northern district of Illinois, and filed his precipe for summons and bond for costs, in the words and figures following, to wit:

Precipe for summons.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss.:

Circuit court, May term, A. D. 1862.

FULTON COUNTY BANK
v.
MARINE BANK OF CHICAGO. } Trespass on the case; damages, $2,500.

You will please issue a summons in the above-entitled cause, in favor of the above-named plaintiff, who is a citizen of the State of New York, against the above-named defendant, who is a citizen of the State of Illinois, and make the same returnable to said court on the 1st Monday of May, A. D. 1862.

Dated the 21st day April, A. D. 1862.

Yours, &c.,

SMITH, HART & CLYDE, *Plff's Att'ys.*

To WM. H. BRADLEY, Esq., *Clerk of said court.*

3 Endorsed: Filed Ap'l 21st, 1862.

WM. H. BRADLEY, *Clerk.*

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit Court, May term, A. D. 1862.

FULTON COUNTY BANK
v.
MARINE BANK OF CHICAGO.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, hereby agree and stipulate that execution may issue against our property for any costs taxed against it.

Dated this 21st day of April, A. D. 1862.

SMITH, HART & CLYDE.

Endorsed: Filed April 21, 1862.

WM. H. BRADLEY, *Clerk.*

4 And thereupon a summons issued against said defendants, in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Marine Bank of Chicago, if it shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of May next, to answer unto Fulton County Bank, in a plea of trespass, on the case to its damage, as it alleges, of twenty-five hundred dollars, and have you then and there this writ.

Witness the Hon. Roger B. Taney, Chief Justice of the
[L. S.] Supreme Court of the United States of America, at Chicago aforesaid, this twenty-first day of April, in the year of our
5 Lord one thousand eight hundred and sixty-two, and of our independence the 86th year.

WM. H. BRADLEY, *Clerk.*

Marshal's return.

I have this 23d day of April, A. D. 1862, served the within writ, by leaving a copy of the same in the hands of J. Young Scammon, president of the within named Marine Bank of Chicaco.

J. R. JONES,
U. S. Marshal of the Northern District of Illinois.
By GEO. L. WEBB, *Deputy.*

Endorsed: Filed April 26, 1862.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 5th day of May, A. D. 1862,
6 the plaintiff, by its attorney, came and filed its declaration against the defendant, in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA:

Circuit court of the United States for the seventh circuit and northern district of Illinois, of the May term, 1862.

NORTHERN DISTRICT OF ILLINOIS, *ss.*

The Fulton County Bank a corporation created, existing and doing business under and by virtue of the laws of the State of New York, and having its place of business at Gloversville, in said state of New York, plaintiff in this suit, by Smith, Hart & Clyde, its attorneys, complain of the Marine Bank of Chicago, a banking corporation, created, existing and doing business under and by virtue of the laws of
7 the State of Illinois, and having its place of business at Chicago, in said district aforesaid, defendant in this suit, summoned to answer, &c., in a plea of tresspass on the case.

For that whereas the said defendant, on the first day of May, A. D. one thousand eight hundred and sixty-one, was, and for a long time prior thereto had been, engaged at the city of Chicago aforesaid, in the business of banking and in collecting money upon mercantile paper payable to eastern parties, from individuals, corporations and firms in the city of Chicago, and elsewhere in the State of Illinois, for reward and compensation according to the custom of such banks and bankers in the city of Chicago. That on or about the twelfth day of April, A. D. 1861, at Chicago aforesaid, the said plaintiff delivered to the said defendant a certain promissory note, bearing date the first day of September, A. D. one thousand eight hundred and sixty, made by Cooley, Farwell & Co., a mercantile firm doing business in the city of Chicago, for the sum of two thousand dollars, payable to the order of E. Parsons, eight months after the date thereof, and by said Parsons endorsed the property of said plaintiff for collection in money, the proceeds when collected
8 to be remitted to the said plaintiff, that said defendant at Chicago aforesaid received said promissory note for collection

from said plaintiff as aforesaid; and the plaintiff further says that it then and there became and was the duty of the said defendant to collect and receive from said firm of Cooley, Farwell & Co. the said sum of two thousand dollars in money, at the maturity of the note, to account to and remit to the said plaintiff the proceeds thereof. Yet the said defendant, not regarding its duty and obligation in the premises, but contriving how to injure and defraud the said plaintiff, did not at the time aforesaid, nor at any other time, collect or receive said sum of two thousand dollars in money upon said note, as it was in duty bound to do, but so to do has hitherto wholly neglected and refused, and in violation of its duty and obligation in this behalf surrendered and delivered up said promissory note to said Cooley, Farwell & Co., without receiving and collecting thereon the said sum of two thousand dollars in money, or any part thereof, and has hitherto wholly neglected and refused to account to said plaintiff therefor. By reason and means whereof the said sum of two thousand dollars became and is wholly lost to said plaintiff, to the damage of
9 said plaintiff in the sum of two thousand five hundred dollars, and therefore said plaintiff brings his suit, &c.

SMITH, HART & CLYDE,
Plff's Att'ys.

Endorsed: Filed May 5, 1862.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 7th day of May, A. D. 1862,
10 the said defendant, by its attorneys, came and filed their plea in the words and figures following, to wit:

Plea of defendant.

United States circuit court, northern district of Illinois.—May term, A. D. 1862.

FULTON COUNTY BANK
v.
MARINE BANK OF CHICAGO.

And the said defendant, by its attorneys, McCagg & Fuller, comes and defends the wrong and injury when, &c., and says that it is not guilty in manner and form as the plaintiff hath above thereof complained against it, and of this it puts itself upon the country, &c.

McCAGG & FULLER,
Deft's Attorneys.

Endorsed: Filed May 7, 1862.

WM. H. BRADLEY, *Cl'k.*

11 And be it also remembered that on the said the twenty-first day of April, A. D. 1862, the said plaintiff, by its attorneys, came and filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, and filed its certain other precipe for summons and bond for costs, in the words and figures following, to wit:

Precipe for summons.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

Circuit court, May term, A. D. 1862.

FULTON COUNTY BANK
v.
MARINE BANK OF CHICAGO. } Trespass on the case, damages $1,500.

You will please issue a summons in the above-entitled cause in favor of the above-named plaintiff, who is a citizen of the State of New York, against the above-named defendant, who is a citizen of the State of Illinois, and make the same returnable to said court on the 1st Monday of May, A. D. 1862. Dated the 21st day of
12 April, A. D. 1862.

Yours, &c., SMITH, HART & CLYDE,
Plff's Att'ys.

To WM. H. BRADLEY, *the Clerk of said court.*

Endorsed: Filed April 21, 1862.
WM. H. BRADLEY, *Cl'k.*

Bond for costs.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

Circuit court, May term, A. D. 1862.

FULTON COUNTY BANK
v.
MARINE BANK OF CHICAGO.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, hereby agree and stipulate that execution may issue against
13 our property for any costs taxed against it.

Dated this 21st day of April, A. D. 1862.
SMITH, HART & CLYDE.

Endorsed: Filed April 21st, A. D. 1862.
WM. H. BRADLEY, *Clerk.*

And thereupon a summons issued in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you that you summon Marine Bank of Chicago, if it shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of May next, to answer unto Fulton County Bank in a plea of trespass on the case, to its damage, as it alleges, of fifteen hundred dollars, and have you then
14 and there this writ.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, at Chicago
[L. S.] aforesaid, this twenty-first day of April, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the 86th year.

WM. H. BRADLEY, *Clerk.*

Marshal's return.

I have this 23d day of April, A. D. 1862, served the within writ, by leaving a copy of the same in the hands of J. Young Scammon, president of the within named Marine Bank of Chicago.

J. R. JONES,
U. S. Marshal of the Nor. Dist. of Illinois.
By GEO. L. WEBB, *Deputy.*

Endorsed: Filed April 26, 1862.

WM. H. BRADLEY, *Clerk.*

And the defendants, on the 5th day of May, A. D. 1862,
15 come and file their declaration in the words and figures following, to wit:

United States of America, circuit court of the United States for the seventh circuit and northern district of Illinois, of the May term, A. D. 1862.

The Fulton County Bank, a corporation existing under the laws of the State of New York, and having its place of business in the State of New York, plaintiff in this suit, by Smith, Hart & Clyde, its attorneys, complains of the Marine Bank of Chicago, a corporation existing under the laws of the State of Illinois, and having its place of business at Chicago in said district, defendant herein, who has been summoned, &c., of a plea of trespass on the case.

For that whereas, at the time of the committing the grievances hereinafter mentioned, the said defendant was a bank, located and doing a usual banking business at Chicago, to wit, at the district aforesaid, and as such held itself out to the world for the purpose of such business, a part of which said business was the collecting for compensation and reward of bills of exchange and promissory notes, and remitting and forwarding the proceeds thereof when collected to the parties entitled thereto, and in case of non-payment of such paper at ma-
16 turity to give due and proper notice of such non-payment.

And whereas heretofore, to wit, on the thirteenth day of April, A. D. 1861, the said plaintiff, then and there, being a citizen of the State of New York, was then and there the owner of a certain promissory note in writing, made by one H.W. Hunt & Co., in and by which said promissory note the said H. W. Hunt & Co. then and there promised to pay to the order of one William C. Allen, eight months after the date thereof, the sum of nine hundred and forty-three dollars and fifty cents, at the Merchants' Savings Loan and Trust Company, with exchange on New York, for value received, which said promissory note bore date the first day of September, A. D. 1860; and which said promissory note the said William C. Allen, who is a citizen of the State of New York, then and there endorsed in writing, and then and there by said endorsement ordered and appointed the contents of said note to be paid to said plaintiff, and then and there delivered said note so endorsed to said plaintiff, and said plaintiff avers that said note so made, endorsed and delivered as aforesaid, matured and became due and payable according to its tenor and effect, to wit, on the fourth day of May A. D. 1861, to wit, at Chicago in the district aforesaid; and the said plaintiff then and there, to wit, on said thirteenth day of April, A. D. 1861, to wit, at the district aforesaid, for the purpose of collecting and receiving payment of the sum of money mentioned in said promissory note, to wit, the sum
17 of nine hundred and forty-three dollars and fifty cents, with exchange on New York, endorsed and delivered said promissory note to the said defendant for collection, and thereby then and there authorized and required the said defendant to present the said promissory note for payment and make demand therefor to and of the said H. W. Hunt & Co, when the same should become due and payable according to its tenor and effect, to wit, at the district aforesaid, and the proceeds, when collected, to remit to the said plaintiff, and in case of non-payment thereof to give due and proper notice thereof according to the custom of merchants, &c.; and the said defendant then and there, to wit, on said thirteenth day of April, A. D. 1861, to wit, at said district, accepted and received the said promissory note so endorsed from the said plaintiff for collection, to present and make demand of the said H. W. Hunt & Co, for the sum of money mentioned in said note, to wit, the sum of nine hundred and forty-three dollars and fifty cents, with exchange on New York, when the same should afterwards become due and payable, according to its tenor and effect, to wit, at the district aforesaid, and when paid to remit the proceeds thereof to the said plaintiff; and in case of non-payment to give due and proper notice thereof, for certain compensation

and reward, and thereupon it became and was the duty of the said defendant, upon the maturity of said promissory note, to wit, at the district aforesaid, to present the same to and make demand of said H. W. Hunt & Co. for the said sum of money specified in said
18 note, with exchange as aforesaid, and on payment thereof to accept and receive the said sum of money from said H. W. Hunt & Co., and then and there to remit or pay over to said plaintiff said sum of money, less certain reasonable reward and compensation; and in case of non-payment thereof to give due and proper notice of such non-payment, yet the said defendant, not regarding its duty in that behalf, but contriving and intending to injure and defraud the said plaintiff in that behalf, did not nor would, at the time when said note became due and payable according to its tenor and effect, nor at any time before or since then collect of and from the said H. W. Hunt & Co. the sum of money in said promissory note specified, and did not nor would pay over or remit to said plaintiff the said sum of money specified in said note, less certain reasonable compensation and reward, nor give notice of its non-payment, to wit, at the district aforesaid; and the said plaintiff saith that the said defendant, not regarding its duty in that respect, but wholly disregarding the same and intending and contriving how to injure the said plaintiff in the premises, to wit, at the time when said note became due and payable according to its tenor and effect, to wit, at the district aforesaid, received of the said H. W. Hunt & Co., without authority, in payment and satisfaction of said note, a quantity of depreciated bank bills, to wit, of less value than the sum specified in said note, and then and there delivered up the said note to the said H. W. Hunt & Co., by means of which said unauthorized act of the said defendant, and of its said neglect of duty in the premises, the
19 said sum of nine hundred and forty-three dollars and fifty cents, so secured to be paid by said promissory note, afterwards, to wit, on the fourth day of May, A. D. 1861, to wit, at the district aforesaid, became, and was, and is wholly lost to the plaintiff. And whereas also the said defendant, on the fourth day of May, A. D. 1861, was, and for a long time prior thereto had been, a bank located and doing business at Chicago in said district, a part of which said business was the collecting of mercantile paper due and payable at Chicago and elsewhere in the State of Illinois, for compensation and reward, according to the custom of bankers and banks in said city of Chicago. That on or about the thirteenth day of April, A. D. 1861, at Chicago in said district, the said plaintiff delivered to said defendant another certain promissory note, made by one H. W. Hunt & Co., bearing date the first day of September, A. D. 1860, for the sum of nine hundred and forty-three dollars and fifty cents, with exchange, payable to the order of William C. Allen, at Chicago, eight months after the date thereof, and endorsed by said Allen to said plaintiff, and which was the property of the said plaintiff, for collection in money, the proceeds when collected to be remitted or payed over to said plaintiff. That said defendant, at Chicago, in the district aforesaid, received said promissory note for collection from said plaintiff as aforesaid; and the plaintiff further says that it then and there became,

and was the duty of the said defendant to collect and receive
20 from the said H. W. Hunt & Co. the said sum of money specified in said note, to wit, the sum of nine hundred and forty-three dollars and fifty cents in money at the maturity of the said note, to account to, and pay over to said plaintiff the proceeds thereof, to wit, at the district aforesaid. Yet the said defendant, not regarding its duty and obligation in the premises, but contriving how to injure and defraud the said plaintiff in this behalf, did not at the time when said note matured, or at any other time, collect or receive said sum of nine hundred and forty-three dollars and fifty cents in money upon said note, as it was in duty bound to do, but so to do has hitherto wholly neglected and refused, to wit, at the district aforesaid, and in violation of its duty and obligation in this behalf, surrendered and delivered up said promissory note to said H. W. Hunt & Co., without receiving or collecting thereon the said sum of nine hundred and forty-three dollars and fifty cents in money, or any part thereof, to wit, at the district aforesaid, and has hitherto wholly neglected and refused to account to the said plaintiff therefor. By reason and means whereof the said sum of nine hundred and forty-three dollars and fifty cents became, and is wholly lost to the said plaintiff, to wit, at the district aforesaid, to the damage of the said plaintiff of fifteen hundred dollars, and therefore he brings his suit, &c.

SMITH, HART & CLYDE,
Plff's Att'ys.

Endorsed: Filed May 5, 1862.

WM. H. BRADLEY, *Cl'k.*

21 *Plea of the defendant.*

United States circuit court, northern district of Illinois, May term, A. D. 1862.

FULTON COUNTY BANK
v.
MARINE BANK OF CHICAGO.

And the said defendant, by its attorneys, McCagg & Fuller, comes and defends the wrong and injury, when, &c., and says that it is not guilty in manner and form as the said plaintiffs hath above thereof complained against it, and of this it puts itself upon the country, &c.

McCAGG & FULLER,
Def'ts Attorneys.

Endorsed: Filed May 7, 1862.

WM. H. BRADLY, *Cl'k.*

22 And afterwards, to wit, on the 3d day of July, A. D. 1862, in the record of the proceedings of said court in said cause is the following entry, to wit:

FULTON COUNTY BANK
v.
MARINE BANK OF CHICAGO. } Case No. 1.

FULTON COUNTY BANK
v.
MARINE BANK OF CHICAGO. } Case No. 2.

Now come the parties, by their respective attorneys in these two entitled causes, and by agreement, it is ordered by the court that the two causes be consolidated, and upon issue joined thereupon come a jury of good and lawful men, to wit: John Dixon, James M. Whipple, Lewis Wormell, John Parmly, Orville Slusser, John D. Carman, Thomas J. Rudd, Smith McClery, John Stewart, W. W. Carothers, Henry Sloan, and James G. Griffith, who were duly elected, tried, and sworn, and after hearing the evidence and the arguments of counsel and receiving instruction from the court, the jury re-
23 tire to consider of their verdict; and after a short absence return into court with the following verdict, to wit: We, the jury, find the defendant guilty, and we assess the damages of the plaintiff to the sum of twenty-nine hundred and seventy-seven dollars and eighty-four cents, and the defendant, by his attorney, moves the court for a new trial.

And afterwards, to wit, on the 7th day of July, A. D. 1862, in the record of the proceedings of said court in said cause is the following entry, to wit:

FULTON COUNTY BANK
v.
MARINE BANK OF CHICAGO. } Case.

Now comes on to be heard the motion of the defendant heretofore entered herein for a new trial of this cause, when the plaintiff, by its attorney, enters a remittitur on the damages assessed by the jury of two hundred dollars; and thereupon the court overrules the motion of the defendant for a new trial.

It is thereupon considered and adjudged by the court that the plaintiff have and recover of the defendant the sum of twenty-
24 seven hundred and seventy-seven dollars and *and* eighty-four cents, that being the damages as assessed by the verdict of the jury heretofore entered herein, less the remittitur aforesaid, together with its costs by it about its suit in this behalf expended, amounting to the sum of forty-eight dollars and seventy-six cents, and that it have its execution therefor.

And thereupon, on the 7th day of July, A. D. 1862, said defendants, by their attorneys, come and file the following bill of exception by them taken, in the words and figures following, to wit:

25 UNITED STATES CIRCUIT COURT,
Northern District of Illinois, ss:

May term, 1862.

THE FULTON COUNTY BANK
v.
THE MARINE BANK OF CHICAGO. } Assumpsit.

THE FULTON COUNTY BANK
v.
THE MARINE BANK OF CHICAGO. } Assumpsit.

Be it remembered that on the trial of the above-entitled causes, the same having been by agreement of parties as well as the direction of court consolidated and tried as one suit, the plaintiff introduced in evidence on its part, to sustain the issues joined therein, the following mutual stipulation, signed by *by* both said parties, by their respective attorneys, and read to the jury said stipulation, together with the several letters and circulars thereto annexed and specifically referred to as the exhibits described in said stipulation, which are all herein now more fully and particularly set out as true copies thereof, as follows, to wit:

Mutual stipulation.

It is hereby stipulated between the parties above named
26 that the copy of a letter hereto attached, marked "A," dated April 10th, 1861, also a letter hereto attached, marked "B," dated April 13th, 1861, also a letter hereto attached, marked "C," dated May 1st, 1861, also a letter hereto attached, marked "D," dated May 6th, 1861, may be used as evidence upon the trial of the two suits now pending in said court between the above-named parties, so far as the same may be applicable in each case.

It is further stipulated that it is admitted on the part of the defendant that the notes mentioned in the plaintiff's declaration are the same notes mentioned in the letter of April 10th, 1861, as Cooley, Farwell & Co., $2,000, May 4, at Mercht. S. L & T. Co., H. W. Hunt & Co., the same, May 4th, $943 50 and ex., the receipt of which was acknowledged by the letter of April 13th, 1861, before mentioned.

It is hereby further stipulated that it is admitted that T. P. Roberts will testify that he, as one of the clerks of the defendant, by the direction of the defendant, enclosed in a letter envelope a circular of December 8th, 1861, directed to the plaintiff at its place of business, and deposited the same in the post office in the city of Chicago, postage paid, on or about the 9th day of December, 1861, a copy of which circular is hereto attached, marked exhibit "A," and that said witness will also testify that he also enclosed in a letter envelope a circular of April 20th, 1861, and directed the same to the plaintiff at its place of business, and deposited the same in the post office in the city of Chicago, postage paid, on or about the 21st day of April,
1861, a copy of which circular is hereto attached, marked ex-
27 hibit "B."

It is also stipulated as evidence in the two suits, to be used by the plaintiff, that on or about the 21st day of April, 1862, the plaintiff made a demand of the defendant for the amount of the note of Cooley, Farwell & Co., also H. W. Hunt & Co., and defendant declined to pay.

HOYNE, McCAGG & FULLER,
Att'ys for Def'ts.
SMITH, HART & CLYDE,
Att'ys for Pl'ffs.

JUNE 16, 1862.

Copy "A."

H. CHURCHILL, *President.*
JOHN McLAREN, Jr., *Cashier.*

FULTON COUNTY BANK,
Gloversville, N. Y., April 10th, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of instant received with inclosures. Inclosed I send paper for collection, as stated below.

Respectfully, yours,

JOHN McLAREN, JR., *Cashier.*

Cooley, Farwell & Co.,	at	Merch't S. & L. Co.,	May 4th,	$2,000
W. H. Hunt & Co.,	"	do.	" 4	943 50
and ex.				
28 Edward Parsons,	at	Merch't S. & L. Co.,	May 4,	1,500
D. C. Mills on E. R. Bowen			20	200

"B."

THE MARINE BANK OF CHICAGO—CHICAGO MARINE AND FIRE INSURANCE COMPANY, *Chicago, Illinois, Ap'l* 13, 1861.

JOHN McLAREN, Jr., Esq., *Cas., Gloversville:*

DEAR SIR: Your favor of the 10th with enclosures, as stated, is received, and shall have attention.

Respectfully, yours,

H. B. DOX, *Cas.*
ROBERTS.

Ex. 7 p. c.

C.

MARINE BANK, *Chicago, May* 1, 1861.

FULTON CO. BANK, *Gloversville, N. Y.:*

Your account has credit as follows:

Respectfully, yours,

HAMILTON B. DOX, *Cashier.*

Cooley, Farwell & Co., $2,000.

29 MARINE BANK. "D."

Chicago, May 6, 1861.

FULTON CO. BANK: Your account has credit as follows:

Respectfully yours,

HAMILTON B. DOX, *Cashier.*

H. W. Hunt & Co	$943 50
	94 35
	$1,037 85

MARINE BANK OF CHICAGO,

Chicago, Ill., Dec. 8, 1860.

DEAR SIR: Our late circular had reference to a probably temporary interruption of our remittances in exchange, for collections made for our eastern correspondents.

We find, however, that the supply of eastern exchange diminishes daily; the amount is altogether unreliable, and rates have advanced to 8 and 10 per cent. for such funds as are current here. We are obliged, therefore, to notify you that for the present, and until further notice, we shall place all funds received by us in payment of your collections to your credit in such currency as is received here (and when payable with exchange, with the nominal rate added, unless otherwise instructed by you) to be drawn for only in like currency. If this course is not agreeable to you please advise us immediately, and we will either return your collections, or place them in the hands of such parties here as you may designate.

By order of the board:

HAMILTON B. DOX, *Cashier.*

Exhibit "A."

30 MARINE BANK OF CHICAGO,

Chicago, Ills., April 20, 1861.

DEAR SIR: Owing to the unusual scarcity of eastern exchange, consequent upon the depreciation in price of the State bonds, upon which our currency is based, and the disturbance in business caused by the political and revolutionary condition of the country, it will be impossible at present to continue remittances to eastern correspondents with our customary regularity. We are obliged, therefore, to notify you that for the present, and until further notice, we shall place all funds received by us in payment of your collections to your credit, in such currency as is received here, which is exclusively bills of the Illinois banks, secured upon State stocks, (and when payable with exchange, with the nominal rate added, unless otherwise instructed by you.) to be drawn for only in like bank bills.

If this course is not agreeable to you, please advise us immediately, and we will either return your collections or place them in the hands of such parties as you may designate.

By order of the board:

J. YOUNG SCAMMON, *President.*
HAMILTON B. DOX, *Cashier.*

Exhibit "B."

After the reading of the said stipulation and the exhibits as aforesaid, introduced by the agreement and stipulation of the parties aforesaid,

31 The plaintiff then called as a witness, to sustain the issues on its part, one

H. W. Hunt, who, being duly sworn, testified as follows:

I reside in Chicago; am a member of H. W. Hunt & Co. I know the note now shown me for $943 50. It was made by our firm. It was paid at the Marine Bank in currency. This currency was taken from our drawer, and I think it was Illinois currency. Can't say it was such currency as was in circulation at the time. It was paid May 4th, 1861. I can't say that it was the same kind of currency taken at the Merchants' Saving Loan and Trust Company Bank in this city, (Chicago.) I can't give the names of any of the banks which issued it, nor can I name the bills.

There was a difference between the value of this money and gold, the bills being lower in value and depreciated. As I recollect, there was no regular price at which exchange could be bo't for Illinois currency on that day. Most of the banks charged ten per cent. This note was payable with exchange on New York. I paid it with exchange. We kept our account with the Merchants' Saving Loan and Trust Company. We had to sort our currency to deposite at the Merchants' Saving Loan and Trust Company. My impression is now that we counted out and paid the money on the note without assorting it, as we had received it. The currency which the Merchants' Saving Loan and Trust Company would not receive we changed for other currency. Some of it we bought grain with. Some we paid notes with.

Cross-examination of witness H. W. Hunt.

32 We were selling dry goods and cloths about that time; if we thought a man's note better than the money we did not take it, (the money;) if we thought the money better we took it. We sold goods for this money on the same principle that we took it for the notes. We told our customers generally that the money was not good, but when we took it we took it as a matter of interest. I think this kind of money was about all the currency we had through the winter. This money at one time depreciated and went down very rapidly. If the profit on the goods was less than the loss on the bills we would not take it.

The plaintiff then called as a witness, to sustain the issues on its part, one John Y. Farwell, who, being sworn, testified as follows:

I am one of the firm of Cooley, Farwell & Co., located and doing business in Chicago. I remember the note for $2,000, which was sent for collection to the Marine Bank of Chicago. It was due May 1st and 4th. It was paid April 30th, 1861. This is the check given for it.

We kept our bank account at the Western Fire and Marine Insurance Company of Chicago. We had a small account with the Merchants' Saving Loan and Trust Company. We could not get exchange with the currency. I think we paid ten per cent. for exchange in this currency. Currency was then depreciated. We did assort our funds and deposite different lists with different banks. All the currency which we deposited with the Western Fire Marine Insurance Company was shorter and much more depreciated than that which would be rec'd by the Merchants' Saving Loan and Trust Co. This check was drawn payable in currency, and the currency was
33 worth less than one hundred cents on the dollar. I think the currency was taken from the bank and carried to the Marine Bank and paid there.

Cross-examination of John Y. Farwell.

The currency deposited at the Merchants' Saving Loan and Trust Company was such as we rec'd for goods. We are large wholesale dealers in dry goods. The Merchants' Saving Loan and Trust Company declined selling exchange on New York at 10 per cent. My impression is that on April 30, 1861, the money received at the Merchants' Saving Loan & Trust Co. was a shorter list than those rec'd at other banks. I think that all banks which would sell exchange sold it at ten per cent. I think Adsit and Aiken and Dunham also discriminated in regard to the money. I did not pay this note myself. I do not doubt but the currency was paid over the counter, from the appearance of the check. We paid other obligations in currency.

Direct examination of John Y. Farwell resumed.

We did make a difference in price where we sold goods for this kind of currency. We did take this kind of money on our notes, for we were obliged to take it. We did refuse, in two or three instances, to take this currency. We called country notes as bad as this currency at that time.

Cross-examination of John Y. Farwell resumed.

It was about this time we refused to take this currency. About the middle of May this currency was not taken. I did not
34 sign the bankers' agreement to take this currency while the war lasted. J. H. Burch also refused to receive this currency.

These bankers had been doing a large business. Burch, Aiken & Adsit must necessarily have been doing a small business. Hoffman & Gelpcke, The Marine Fire Insurance Co., Tucker & Carver, all did a large business in this currency.

The defendant, by its counsel, then admitted that all the last-named bankers are now bankrupt.

The defendant's counsel by the consent of plaintiff's counsel, called to sustain the issues on the defendant's part, one L. C. Ellsworth, who, being sworn, testified as follows:

I have been a banker in Chicago for 3 or 4 years. I know the value of Illinois bank bills. The value of the currency used in April and May, 1861, was about from 70 to 72 cents. These were the bills in use in general circulation. The notes of the Illinois banks were generally received. I never saw any Wisconsin, Ohio, or Indiana bills for two months. When I wanted good money I bought it. When I bought bills of Indiana banks I paid in Illinois currency. I paid about 10 per cent. premium.

The pl'ffs then called as a witness, to sustain the issues on its part, one James H. Woodworth, who, being duly sworn, testified as follows:

I am the President of the Western Marine & Fire Insurance Co., and was April and May, 1861. At that time the currency rec'd by us was Illinois bank bills. There might have been a little in circulation which had nearly a par value. There was one bank at Galena; one at Bloomington.

35 On the 1st and 4th of May, '61, hardly any two banks were of the same value; there were one or two banks in Chicago that took a less number of bank bills; when we rec'd an amount of bills sometimes we assorted; the banks were in the habit of paying out the poorest currency to some extent. On May 1st, 1861, gold bought exchange at $\frac{1}{2}$ per cent.; bills of the State Bank of Iowa, at from $1\frac{1}{2}$ to 2 per cent.; the bills of the Marine Bank of Chicago, at about the same; exchange was about 10 per cent. for currency; this was the common price

Cross-examination of James H. Woodworth.

The check of Cooley, Farwell & Co. would at that time have paid a note sent to us for collection. The bills of the Bank of Bloomington made no appreciable amount of the circulation.

The plaintiff then offered as a witness, to support the issues on its part, James Adsit, who, being duly sworn, testified as follows:

I am a banker in Chicago, and have been for two years; I knew how money matters were in Chicago, in May, 1861; some banks made a difference in bank bills; there was a part of the bank bills which were called better than others; there was a select list, and an indiscriminate list; the Chicago Marine and Fire Insurance Company used the latter list; when we received the bills on the long list, we marked them select; for collections from the east, towards the last, I refused to receive Illinois currency. The Merchants'

36 Loan & Trust Company had a short list; Aiken, Norton and Burch had a short list, also, which they thought would stand fire.

Cross-examination of James Aiken.

The great body of the circulation on the last of April and first of May, 1861, was Illinois currency; that which was paid out by the banks was the poorest and the best was kept.

Direct examination of James Adsit resumed.

The holding of the select lists by the banks accounts for its absence.

The plaintiff then offered in evidence in support of the issues in its behalf.

Note of H. W. Hunt & Co., dated Sept. 1st, 1860, at 8 months, for $943 50, and not of Cooley, Farwell & Co., dated Sept. 1st, 1860, at 8 months, for $2,000 00.

The plaintiff then rested its case.

Defence.

The defendant then read in evidence from the stipulation on file, and already referred to the printed circular of Dec. 8th, 1860, marked exhibit "A," and also the printed circular of April 20th, 1861, marked exhibit "B."

37 The defendant then read as evidence the letter from the plaintiff to the defendant, dated May 1st, 1861, as follows, to wit:

Bill of except. (1.)

H. CHURCHILL, *President.*
JOHN MCLAREN, Jr., *Cashier.*

FULTON COUNTY BANK,
Gloversville, N. Y., May 1, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Please hold the avails of the collections I have sent you, subject to my orders, and advise the am't credited on H. W. Hunt & Co., note, due 4th inst. It is payable with exchange.

Yours, truly,

JOHN MCLAREN, JR.

The defendant then read as evidence, the letter from pl'ff to def't dated April 10, 1861.

(2.)

H. CHURCHILL, *President.*
JOHN MCLAREN Jr., *Cashier.*

FULTON COUNTY BANK,
Gloversville, N. Y., April 10, 1861.

H. B. DOX, Esq., *Cashier:*

DEAR SIR: Your favor of — instant received, with inclosures. Inclosed I send paper for collection, as stated below.

Respectfully, yours.

JOHN McLAREN, JR., *Cashier.*

Cooley, Farwell & Co.,	at Merch't S. & L. Co.,	May 4th,	2,000	
H. W. Hunt & Co.,	" do	" 4,	943	50 & ex.
Edward Parson,	" do	" 4,	1,500	
D. C. Mills, on E. R. Brown,		" 20,	200	13

38 The defendant then called one Hamilton B. Dox, as a witness on the part of the defendant, who being duly sworn, testified as follows:

In April and May, 1861, I was cashier of the Marine Bank, of Chicago; I have heard the testimony this morning and have seen the letters which have have been introduced; ten per cent. exchange was collected on the 943 50 Hunt note on currency; it was the current rate for Illinois currency; this currency was the same as rec'd by us for our debts and other collections sent to us in the absence of express instructions. It takes about three days for a letter to go from Chicago to Gloversville.

Cross-examination of Hamilton B. Dox.

The funds rec'd on these collections was mixed with the other funds of the bank. On April 21st, 1862, there was par currency in circulation in Chicago. On redirect examination the witness stated: I know what was the circulating medium at Chicago, during the fall of 1860, and the winter and spring of 1861, and what was the meaning of the word "currency," as used during the last five or six years at Chicago and vicinity.

The word "currency" meant the bills of the free banks of Illinois and Wisconsin, and which were always distinguished from coin and from the bills of other States than Illinois and Wisconsin.

In the fall of 1860, and until April 1861, the currency in use for all business transactions at Chicago and vicinity was the bills of the free banks of Illinois and Wisconsin.

After the first of April, 1861, and until May 18th, 1861, the currency or paper in circulation was almost wholly composed of the
39 issues of the free banks of Illinois.

As compared with coin or exchange on New York, this currency was always a depreciated currency. It was of fluctuating and uncertain value. Soon after the election in Nov., 1860, it began to depreciate in value. In Nov. and Dec., 1860, it was from five to ten per cent. discount for coin.

The bills of the different banks differed greatly in value at the

same time. Their values depended upon the New York market value of the stocks deposited for the security of the bills; and the value of different bank notes in circulation as "currency" in the fall of 1860, and winter following, and in the spring of 1861, was not uniform, some being worth more than others.

In Nov., 1860, the bills of nine of the Illinois banks became so much depreciated in value, that they were thrown out or rejected by the banks and the community, and ceased to be used as currency.

After this the remaining bills that were used as currency fluctuated in value from 5 to 10 per cent. discount for coin until the first of April, 1861, when thirty more of the bills of the Illinois banks were thrown out or rejected, and no longer used as currency.

After April 1st, 1861, there were about $6,500.000 of the bills of the Illinois banks in circulation, which was almost the sole circulating medium until May 18th, 1861, when this currency had depreciated so much that it was no longer used as currency. It had then depreciated from 10 to nearly 50 per cent. from coin. Some of the banks were then but little depreciated. The bills of the Marine Bank, the Bank of Galena, Bank of Ottawa, and two or three others, were on the 18th of May, 1861, not so much depreciated, and were worth
40 90 cents to par. But these banks had only a very small circulation, say from $60,000 to $70,000 out of an entire circulation of nearly $6,500,000, and the bills of these banks had not for nearly a year before formed any appreciable part of the circulation in use as money.

During all the time I have been in the banking business at Chicago, there has been a distinction and difference noted between this currency and other kinds of money.

Where a depositor or customer made a deposit with a bank, this currency was entered as such in his bank book, and coin entered as such, and eastern funds as such, and the depositor drew it out as he paid it in, receiving gold for gold, and currency for currency, unless, as was often the case, he was allowed a premium for his gold or eastern funds in currency, when he would draw out the whole in currency.

The currency when deposited was drawn out in like currency unless gold or exchange on New York was specially called for, when the customer was charged the difference in value at the time between currency and gold or exchange, which fluctuated from time to time.

This currency declined in value during the winter and spring of 1861.

During all that time it was used in payment of debts, and in ordinary transactions of domestic business, as the circulating medium. We had hardly any other.

The collections made by defendant for plaintiff were all made in this currency, or in checks upon banks payable in this currency. This was the currency referred to in our circular of Dec. 8th, 1860.

We made all our collections for other parties, whether banks
41 or private individuals, also in this currency, unless specially directed otherwise; and when we remitted to our eastern correspondents the proceeds of such collections we charged them dis-

count or difference between this currency and New York exchange, which varied from time to time.

New York exchange was always worth about ¼ or ½ of one per cent. more than coin.

The funds of the bank were all kept together, including its own, those received on deposit, and for collections; all went into one fund. This fund was made up of this Illinois currency. It is usual and customary for banks and bankers to keep all their funds together.

The defendant put the funds received on collections for plaintiff with its own funds in the usual way.

This currency, which was received in payment of the collections made by defendant for plaintiff, was worth from 90 to 95 cents on the dollar at the time it was received by defendant.

It continued to depreciate in value until May 18, 1861, as did all the like funds held by defendant with which plaintiffs were mixed. After that date it was no longer used as money, but was bought and sold as a commodity by the brokers at from 10 to 55 per cent. discount.

At the time of the demand for payment made by plaintiff in this case, this currency was worth about 60 or 65 cents on the dollar. By this is meant the average value of the bills which had been used as currency or money and in which plaintiff's collections had been made during the winter and spring of 1861, and until May 18, 1861.

The larger portion of these bills were secured by the bonds
42 of the southern or seceded States. They had no other security than those bonds, except what might be got from the stockholders of the banks after the stocks were sold in New York under the banking law of Illinois, which liability of the stockholders was not by bankers regarded in estimating the market value of the bills issued by the banks.

The word "currency," as used in this place, referred to such bank bills as passed current in the community for business purposes, and which were used as money in ordinary business transactions; and these were principally bills issued by the banks of Illinois and Wisconsin.

The bills of all other banks than of these States were worth more than those of Illinois and Wisconsin, and always brought a premium over these. There was but a limited amount of bills of other States in circulation in the winter and spring of 1861.

[The plaintiff objected to all the foregoing evidence tending to show a usage or custom of the defendant and bankers in Chicago, and also as to the meaning attached to the word "currency."]

The currency received by this defendant in payment of the demands collected by it for the plaintiff, were, when collected, placed by it with the other funds of the defendant. The defendant kept all funds together, as well those held by it for others on deposit, or received from collections and its own. And from this common fund it used indiscriminately whatever it had occasien for in the daily transaction of business. When the collections for the plaintiff were made,
43 credit was given the plaintiff, as was the usual practice on the books of the defendant, for the amount in dollars.

This credit expressed the amount in dollars, which defendant had collected for plaintiff in currency, which at the different times of collections were worth from 90 to 95 cents on the dollar in coin. During the winter and spring months of 1861, and while the notes of the Illinois and Wisconsin banks were used as currency, the defendant, as well as the other banks and bankers in Chicago, sorted the currency, reserving the best, and paying out the poorest kinds, so that the latter class of bills were chiefly in use and circulation.

The above was all the evidence in the case.

The court then charged the jury upon the law of the case, and among other instructions, charged the jury that generally a bank or other party receiving a note for collection in the absence of instructions, express or implied, had no right to receive anything but good money, or gold and silver, in payment; but if they believed from the evidence in this case that defendant was authorized expressly, or by implication, by the plaintiff to receive the depreciated currency of Illinois in payment of notes sent it by plaintiff for collection, and to place the amount to the credit of the plaintiff in the usual way, as stated by H. W. Dox, to remain until called for by plaintiff, and that defendant did receive such currency in payment of the plaintiff's collections, and mixed it with its own funds as a part of its business and banking capital, then the defendant is liable to the plaintiff for the value in coin of such currency at the times of payment, with interest from the time of demand of plaintiff for payment, unless the jury believe from the evidence that it was the agreement, express or implied, of the parties that any loss by depreciation of such currency was at the plaintiff's risk, in which case the plaintiff is
44 only entitled to recover the value in coin of such currency at the date of demand for payment, with interest from that time.

To the giving of which instructions the defendant then and there excepted.

The defendant asked the court to instruct the jury, that if they believe from the evidence that the defendant was authorized by the plaintiff to receive in payment of collections for the plaintiff the depreciated currency of Illinois, or bills issued by the free banks of Illinois, and to place the amount to the credit of the plaintiff in the usual way, as stated by H. W. Dox, to remain until demanded by the plaintiff, then the plaintiff is only entitled to recover of the defendants the value in coin of such currency so received by the defendant at the time of demand made for payment by plaintiff, with interest from that date.

Which instructions the court refused to give. To which refusal of the court, the defendant then and there excepted.

The jury then rendered a verdict for the plaintiff for the sum of $2,977 84.

The defendant then moved for a new trial, because of the alleged errors of the court in giving and refusing the several instructions above written.

The plaintiff by his counsel then entered a remittitur for the sum of $200.

45 But the court overruled the motion, and rendered judgment for the plaintiff on the verdict, less the amount remitted by the plaintiff, for the sum of $2,777 84.

In which decision of the court the defendant then and there excepted, and prayed that this its bill of exceptions be signed and sealed, which is done.

THOMAS DRUMMOND. [SEAL.]

Endorsed: Filed July 7th, 1862.

WM. H. BRADLEY, *Clk.*

And afterwards, to wit, on the 15th day of July, A. D.

46 1862, said defendant sued out a writ of error in the words and figures following, to wit:

Writ of error.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The President of the United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you, in said circuit court, between the Fulton County Bank and the Marine Bank of Chicago, a manifest error hath happened, to the great damage of the said Marine Bank of Chicago, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and pro-

47 ceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of the said [L.S.] Supreme Court of the United States, this fifteenth day of July, in the year of our Lord eighteen hundred and sixty-two, and of the independence of the United States the eighty-seventh.

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed July 15th, 1862.

WM. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the same day, to wit, the 15th day of July, A. D. 1862, the said defendant, by its attorney, came and filed its citation in the words and figures following, to wit:

48 *Citation.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the Fulton County Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court for the United States for the northern district of Illinois, wherein the Marine Bank of Chicago is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas Drummond, this 15th day of July, in the year of our Lord eighteen hundred and sixty-two.

THOMAS DRUMMOND.

Endorsed: Filed July 15, 1862.

WM. H. BRADLEY, *Clerk.*

49 Endorsed: We hereby accept service of the within citation, this 15th day of July, A. D. 1862.

SMITH, HART & CLYDE, *Plff's Atty's.*

And on the same day, to wit, on the 15th day of July, A. D. 1862, the said defendants, by their attorneys, come and file their appeal bond in the words and figures following, to wit:

Appeal bond.

In United States circuit court, northern district of Illinois.

Know all men by these presents, that we, the Marine Bank of Chicago, as principal, and J. Young Scammon and H. G. Loomis, as sureties, all of the city of Chicago, Cook county, State of Illinois, are held and firmly bound unto the Fulton County Bank, in the sum of five thousand dollars, to be paid to the said Fulton County Bank, its successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, firmly by
50 these presents, sealed with our seals and dated this tenth day of July, A. D. 1862.

Whereas the above-bounden Marine Bank of Chicago has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in favor of the Fulton County Bank

against the Marine Bank of Chicago, at the July term, A. D. 1862, of the circuit court of the United States for the northern district of Illinois, for the sum of two thousand seven hundred and seventy-seven dollars and eighty-four cents, ($2,777 84,) besides costs of suit, now, therefore, the condition of this obligation is such that if the above-named Marine Bank of Chicago shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

J. YOUNG SCAMMON,
President of the Marine Bank of Chicago.
[SEAL.] J. M. UNDERWOOD,
Cashier Marine Bank of Chicago.
J. YOUNG SCAMMON. [SEAL.]
H. G. LOOMIS. [SEAL.]

Endorsed: Approved.

THOMAS DRUMMOND.

Filed July 15, 1862.

WM. H. BRADLEY, *Cl'k.*

Northern district of Illinois, ss:

51 I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings had in the cause wherein the Fulton County Bank was plaintiff, and the Marine Bank of Chicago defendant, as the same appears from the record of said court, now remaining on file in said court and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the [SEAL.] seal of said court, at office in Chicago, this 22d day of November, A. D. 1862, and of our independence the 87th year.

WM. H. BRADLEY, *Cl'k.*

52 And now comes the said p'ff in error, by its counsel, and assigns the following errors in the foregoing record.

1. That the court erred, in giving the instruction to the jury for the def't in error, above set out, and excepted to by p'ff in error.

2. That the court erred in refusing the instruction asked by p'ff in error.

SAM. W. FULLER,
For p'ff in error.

DEC. 18, 1862.

Filed 6 Dec., 1862.

2619

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1863.

No. 192.

THE MARINE BANK OF CHICAGO,

Plaintiff in Error

vs.

THE FULTON COUNTY BANK,

Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

S. W. FULLER, *for Plaintiff in Error.*

THO. HOYNE, *of Counsel.*

CHICAGO:

BEACH & BARNARD, PRINTERS, 14 SOUTH CLARK STREET.

BRIEF AND ARGUMENT.

The Fulton County Bank, which is a corporation established in the State of New York, sent to the Marine Bank of Chicago, a bank established by law at Chicago, Illinois, some commercial paper against persons residing in Chicago, for collection. The Marine Bank received that paper, and collected it in the depreciated currency of Illinois, which was then almost the only circulating medium in use at Chicago and throughout the State of Illinois; placed the proceeds to the credit of the Fulton County Bank, and advised the latter of what had been done. This occurred in April and May, 1861, and the proceeds of those collections remained in the Marine Bank without being called for, until April, 1862, when the Fulton County Bank, by its agents, demanded of the Marine Bank the amount of the notes sent to the latter for collection, which was refused, and suits were brought to recover it.

The parties held towards each other the relation of principal and agent, and the questions in the case all relate to the duty and liability of the agent in such cases.

On page 12 of the Record, will be found a letter from the principal to the agent, dated April 10, 1861, in which were enclosed Cooley, Farwell & Co.'s note for $2,000, due May 4th, 1861, and H. W. Hunt & Co.'s note for $943.50, due May 4th, 1861, with exchange, which notes are the foundation of this suit.

The principal brought two actions on the case against the agent. The declaration in the first is found on pages 3 &

4 of the Record, and charges the defendant with failure to collect the note of Cooley, Farwell & Co., and giving it up to them without receiving payment of it.

The declaration in the other case is found on pages 6, 7, 8, & 9 of Record, and in one count charges the defendant with negligence in receiving depreciated bank bills in payment of Hunt & Co.'s note, and in the other, with wrongfully giving up the note to Hunt & Co. without receiving in money the amount due upon it.

To these declarations the defendant pleaded not guilty, and by an agreement of the parties, an order was made that the two suits should be consolidated and tried as one case, which was done, and a verdict rendered by the jury for the plaintiff for $2,977.84. The defendant moved for a new trial, when the plaintiff remitted two hundred dollars from the amount of the verdict, and had judgment for the balance, or $2,777.84. (Page 10 of Record.)

The defendant duly acknowledged the receipt of the notes sent to it for collection, and advised the plaintiff of the payment of them, as will be seen by letters "B," "C," "D," pages 12 and 13 of Record.

It appears from the testimony of H. W. Hunt (page 14), and John V. Farwell (page 15), that the two notes in question, and which were made by firms of which they were members, were paid in the depreciated currency of Illinois.

The obvious questions arising upon this consideration of the case, are these: first, what authority had the Marine Bank to receive the depreciated currency of Illinois in payment of those notes? and what right had it to retain the proceeds of those collections until April, 1862?

The last question is fully answered by a letter from the cashier of the Fulton County Bank, to the cashier of the Marine Bank, dated May 1, 1861, written after the notes had been sent to the latter bank for collection, and just

before the maturity of them, directing him to "hold the avails of the collections I have sent you, "subject to my orders." (Page 16 of Record.)

To answer the first question, we will look carefully into the evidence.

On page 13 of the record, is a copy of a circular, sent by the Marine Bank to the plaintiff, on the 9th Dec., 1860:

MARINE BANK OF CHICAGO,
Chicago, Ill., Dec. 8, 1860.

DEAR SIR:

Our late circular had reference to a probably temporary interruption of our remittances in exchange, for collections made for our Eastern correspondents.

We find, however, that the supply of Eastern exchange diminishes daily; the amount is altogether unreliable, and rates have advanced to 8 and 10 per cent. for such funds as are current here. We are obliged, therefore, to notify you that for the present, and until further notice, we shall place all funds received by us in payment of your collections to your credit, in such currency as is received here, (and when payable with exchange, with the nominal rate added, unless otherwise instructed by you) to be drawn for only in like currency. If this course is not agreeable to you, please advise us immediately, and we will either return your collections, or place them in the hands of such parties here as you may designate.

By order of the board.

HAMILTON B. FOX, *Cashier.*

By this circular it told its correspondents plainly, that it could make collections for them only in such currency as was received here (at Chicago), and place the proceeds to their credit, to be drawn for (that is, paid) in like (or the same) currency.

But financial affairs in Chicago grew worse, and the Marine Bank sent to its correspondents, and the Fulton Coun-

ty Bank among them, another circular, also found on pages 13 and 14 of the record, as follows:

MARINE BANK OF CHICAGO,
Chicago, Ill., April 20, 1861.

DEAR SIR:

Owing to the unusual scarcity of Eastern exchange, consequent upon the depreciation in price of the State bonds, upon which our currency is based, and the disturbance in business caused by the political and revolutionary condition of the country, it will be impossible, at present, to continue remittances to Eastern correspondents with our customary regularity. We are obliged, therefore, to notify you that for the present, and until further notice, we shall place all funds received by us, in payment of your collections, to your credit, in such currency as is received here, which is exclusively bills of the Illinois banks, secured upon State stocks, (and when payable with exchange, with the nominal rate added, unless otherwise instructed by you,) to be drawn for only in like bank bills.

If this course is not agreeable to you, please advise us immediately, and we will either return your collections, or place them in the hands of such parties as you may designate.

By order of the board.

J. YOUNG SCAMMON, *President.*
HAMILTON B. DOX, *Cashier.*

This circular is more explicit than the former, in stating the condition of financial affairs at that time; but its legal effect is not much different from the former.

The proof of sending these circulars is found on page 11 of the record, where a stipulation appears to have been made, that Roberts would testify that he sent copies through the post office, postage prepaid, on the days following their respective dates, and Dox testified that it required about three days for a letter to go from Chicago to Gloversville, where defendant in error was established, as its home. The

notes in question were sent to plaintiff in error, on the 10th of April, 1861, their receipt acknowledged on the 13th of the same month (page 12 of the Record), and it was apparently in reply to the circular of April 20, 1861, that the plaintiff below wrote the letter dated May 1, 1861, found on page 17 of the Record, and directing the Marine Bank "to hold the avails of the collections" which had been sent to it.

These circulars were explicit notices to the parties to whom they were sent, that "the currency" used at Chicago "was exclusively bills of Illinois banks"; that it was depreciated from 8 to 10 per cent. on the 8th Dec., 1860, and so much more so on the 20th April, 1861, that remittances could not be made at all, and the bills received in payment of collections would be placed to the credit of the party sending them, "to be drawn for (or paid) in like bank "bills"; and in pursuance of this notice and the express orders of the plaintiff below, the Marine Bank collected the notes of Cooley, Farwell & Co. and H. W. Hunt & Co., and placed the proceeds to the credit of its principal.

But authority to receive this currency in payment of collections, was also derived from the usage and course of business at Chicago, at that time. (See the testimony of Dox, pages 18, 19, 20, and 21; that of Hunt, page 14; Farwell, page 15; of Ellsworth and Woodworth, page 16.)

When an agent may follow the usages of the trade, at the time and place of transacting the business of his agency, see—

Story on Agency, sec. 77, 86, 96, & 225 & 226;
Dunlap's Paley on Agency, pp. 4, 5, & notes, edition of 1856.

Under these circumstances the Marine Bank made the collections in question, in Illinois currency, placed it to the

credit of the Fulton County Bank, notified the latter of the fact, and yet the latter bank, one year afterwards, demanded payment of the amount of the notes which had been collected, in par funds; although the proof shows (page 20), that "at the time the demand was made, the currency "received in payment of those notes, was worth from 60 "to 65 cents on the dollar," and then brought these actions to recover the full par value of the notes which it had sent to the Marine Bank for collection, and seeks to recover that value in coin, on the ground that the Marine Bank had no authority to take that currency in payment, or if it had such authority at the time of making the collections, that some subsequent wrongful act has made it liable for their full par value.

Under the full, explicit evidence in this case, of authority possessed by the Marine Bank to receceive payment of the notes in question in "Illinois currency," and to retain that currency until demanded, the only real question in the case is in regard to the measure of damages.

The plaintiff in error insists that, under the facts of this case, it is only liable for the coin value of the currency received by it, for the defendant in error, at the time of demand, and asked of the court below an instruction to that effect, as follows:

The defendant asked the court to instruct the jury, that if they believe, from the evidence, that the defendant was authorized by the plaintiff to receive in payment of collections for the plaintiff the depreciated currency of Illinois, or bills issued by the free banks of Illinois, and to place the amount to the credit of the plaintiff in the usual way, as stated by H. W. Dox, to remain until demanded by the plaintiff, then the plaintiff is only entitled to recover of the defendant, the value, in coin, of such currency so received by the defendant, at the time of demand made for payment by plaintiff, with interest from that date.

This instruction the court refused to give, and that refusal is one of the errors assigned upon the record of this case.

The court gave the following instruction for the plaintiff below:

The court then charged the jury upon the law of the case, and among other instructions, charged the jury that generally a bank or other party receiving a note for collection in the absence of instructions, express or implied, had no right to receive anything but good money, or gold and silver, in payment; but if they believed, from the evidence, in this case that defendant was authorized expressly, or by implication, by the plaintiff to receive the depreciated currency of Illinois, in payment of notes sent it by plaintiff for collection, and to place the amount to the credit of the plaintiff in the usual way, as stated by H. W. Dox, to remain until called for by plaintiff, and that defendant did receive such currency in payment of the plaintiff's collections, and mixed it with its own funds as a part of its business and banking capital, then the defendant is liable to the plaintiff for the value in coin of such currency at the times of payment, with interest from the time of demand of plaintiff for payment, unless the jury believe, from the evidence, that it was the agreement, express or implied, of the parties, that any loss or depreciation of such currency was at the plaintiffs risk, in which case the plaintiff is only entitled to recover the value, in coin, of such currency at the date of demand for payment, with interest from that time.

And the giving of this instruction is another error assigned on the record.

It was held in the case of *Robinson* vs. *Nobles, Adm'rs*, 8 Peters, 182, that upon a contract payable in depreciated paper, the creditor, upon default of payment, was entitled to recover only the coin value of such paper currency at the time it should have been paid.

In the present case, the plain, simple contract between the parties was, that the Marine Bank would receive the Illinois currency then in use, in payment of the demands

sent to it by the plaintiff below, and pay it over on demand, and on its failure to make such payment it became liable for the coin value of the currency at the time the demand was made.

Up to that time it was guilty of no breach of duty. It had followed the instructions of its principal in collecting and retaining the "Illinois currency." No action could be maintained against it, to recover that currency or its value, until after a demand for it, and its value at that time is the measure of damages, not only according to the case cited above, but in all cases where a party wrongfully refuses to deliver property on demand.

2 Greenleaf's Evi., 261;
Douglass vs. *McAllister*, 3 Cranch, 298;
Shepherd vs. *Hampton*, 3 Wheaton, 200.

Having collected the demands in "Illinois currency," and retained the proceeds, pursuant to instructions, there was, so far, no breach of duty by the Marine Bank, and the only ground on which it can be charged with a liability to its principal for anything more than the value of that currency at the time of demand is this, that by mixing that currency with its general funds, it converted them to its own use, and thus became liable for their value at that time.

Mr. Dox, the cashier of the Marine Bank, testified, "that "the funds of the bank were all kept together, including "its own, those received on deposit, and for collections" (p. 20).

In this it followed the course of business usual among banks and bankers everywhere; this was proved by Dox, and is a matter of business knowledge possessed by the court, and which it judicially notices.

A bank does not, and it cannot, keep the funds of each of its customers separate from all the others.

No depositor, correspondent or customer of a bank expects that will be done, unless he gives special directions to that effect. No such directions were given by the Fulton County Bank to the Marine Bank, and the latter was fully authorized to keep the funds received for the former in the manner usual among banks, and by the intermingling of those funds with its general funds, its liability to its principal was not changed from what it was at the instant the currency was paid to its clerks over its counter.

But what were its general funds? They were made up "of this Illinois currency," (Dox, p. 20). The testimony of Ellsworth, (p. 16) Woodworth, (p. 16–17) and of Dox (p. 18, 19, 20, 21) shows that the bills of the Illinois banks made up almost all the circulating medium in use at Chicago during the Winter and Spring of 1861.

In considering this part of the case, we ask the court to carefully study the evidence showing the condition of financial affairs at Chicago at that time. The rights and liabilities of these parties must be viewed in the light of the circumstances which then surrounded these transactions. We admit that, ordinarily, a bank is a debtor to its customers for money on account of deposits, collections and loans, and that the subsequent depreciation of the bills received by it, from its customers, is its own loss, and not theirs.

But this rule was established, and is in force only, when the parties are dealing in par funds, of a stable or nearly uniform value, and ought not to be applied to cases where all the business is done with a depreciated currency of a fluctuating value.

The Illinois currency in use at the time of these transactions was made up of the bills of the banks of that State established under the laws of 1851, (p. 163) 1853 (p. 30) and 1857, (pp. 23 and 220) which were secured by the deposit of public stocks with the Auditor of State. These

stocks were chiefly those of the Southern States. The court knows, as a matter of public history, that late in 1860 the market value of those stocks rapidly declined, and continued to do so, with the progress of the rebellion. Dox testified (p. 19), that in November, 1860, and in April, 1861, the bills of thirty-nine banks were rejected, and not used as currency, and that, after this, $6,500,000 of these bills remained in circulation, and was almost the sole circulating medium until May 18, 1861. The Marine Bank had foreseen the coming storm, and, as a warning, sent to its correspondents the circulars of Dec. 8, 1860, and April 20, 1861, written in terms that could not be mistaken, and telling them that only Illinois bank bills were in circulation, that nothing else could be collected, and that if that was taken it could not be remitted, but the bills would be placed to their credit, to be drawn for in like bank bills. The defendant in error must be held to have accepted this proposition, by its letter of May 1, 1861 (p. 17), and this correspondence formed the contract between the parties.

Had this circulation been composed of the bills of a single bank, and those bills made up the currency of the Marine bank, with which the currency received by it for its principal was mingled—as one bill of a given bank is as good as any other bill of the same bank of the same denomination—the Fulton County Bank, under the contract shown in this case, would have been only entitled to the same number of dollars in the bills of that bank as was collected for it. But in the present case instead of one, there were the bills of many banks in circulation, and the Marine Bank took such as were then in use in payment of the notes in question, and put them with its other funds, which were of the same general character, "all made up " of Illinois currency" (Dox p. 20).

This intermixture, having been made in the usual course of business, was proper; did no wrong to the principal, and

the ordinary rules of law, with regard to confusion of goods, apply in this case, and the proprietors have an interest in common in the entire fund, in proportion to their respective shares.

2 Blackstone, 405;
Story on Bailments, sec. 40.

The court below instructed the jury that, although they might believe, from the evidence, the Marine Bank was authorized to receive and retain this currency until called for, and mixed that currency with its own funds, it was liable to its principal for the value of that currency in coin, at that time, unless they further believed, from the evidence, that the parties agreed that the loss, by subsequent depreciation, should be borne by the principal. The currency received by the Marine Bank, for its principal, was worth, at the time of demand in this case, about 60 or 65 cents on the dollar, (Dox's testimony, p. 20).

This, we insist, was erroneous. It ignored the contract of the parties.

Leaving out of sight the express contract of these parties, and seeing that the whole business of the community was done with a depreciated currency, declining in value, that, as all the witnesses in this case testified, a distinction was always made between this currency and par funds, or money, in the ordinary sense of the term, it is unreasonable to suppose that the Marine Bank intended to guarantee the value of this currency, or the other party understood such to be its engagement.

They, in common with the whole State of Illinois, were dealing in this currency as a commodity, and while it was used as money the difference in value was always acknowledged. See Dox and Ellsworth's testimony, pp. 16, 19 and 20.

By the circular of April 20, 1861, the Marine Bank told its customers that the currency it received for them was made up of Illinois bank bills, which would be placed to their credit, to be drawn for, (viz.: paid in like bank bills,) yet the court told the jury that, although this might be so, the Marine Bank was liable for the coin value of the currency on the day it received it, unless an agreement to the contrary was shown, thus holding that a special agreement was necessary to exonerate the agent from liability to his principal for a loss consequent upon following the latter's instructions.

This proposition has, in our opinion, neither law nor reason to support it. The jury were told, if they found certain facts which showed the agent's obedience to its principal's instructions, that the agent was still liable to the principal for the subsequent loss, by depreciation of the currency, unless the parties agreed otherwise. There is not a reported case, nor a dictum of any judge or writer, which intimates that an agent is liable to his principal for fo owing the latter's instructions, and it is equally absurd and unjust to hold him liable for loss under such circumstances.

No agreement is necessary to exempt him from this liability. Immunity from loss follows inevitably from obedience to orders.

There are but two rules for agents to follow in conducting the business of their principals; first, to follow their instructions; secondly, in the absence of these, they are by law expressly instructed to pursue the usual course of that business at that time and place, and here their duty and their liability for loss, terminates.

In the absence of express instructions, " where the agent " has given only the usual credit, or has conducted himself " according to the usual course of business, and has em-

" ployed the usual diligence in his agency, he will not be " responsible for any loss occasioned by the subsequent in- " solvency or fraud of the persons whom he has trusted, or " to whom he has sold the property, if, at the time of the " sale, they were in good credit. So if payment is received " in the usual manner of conducting the like business " transactions, as by receiving a check on a bank from a " person in good credit, who should become insolvent be- " fore the check could be duly presented; *or by receiving* " *the common currency of the country, which should after-* " *wards become depreciated;* in each of these cases the " loss would be the loss of the principal, and not that of " the agent."

Story on Agency, sec. 204, 413;
1 American Leading Cases, 665 (in notes);
Parsons on Contracts, (68–9) and cases cited in notes.

The agent is bound, first, to follow the instructions of his principal, and in the absence of instructions to conform to the usage and custom, in relation to that kind of business, at that time and place; and in the performance of his duty, the agent is understood to contract for reasonable skill and ordinary dilligence, by which is meant that ordinarily possessed and employed by persons of common capacity engaged in the same business, trade or employment.

Story on Agency, sec. 183.

The instruction does not assume that the agent had done any wrongful act; it does not require the jury to find that it had; it assumes that they might find, from the evidence, that the agent had authority to receive and retain Illinois currency in payment of the collections sent to it, and to keep them in the manner detailed by Mr. Dox, (which was

the usual, and, therefore, the proper way of keeping them, in the absence of express instructions to the contrary,) and yet it requires the jury to allow the plaintiff below the coin value of currency on that day, which, to-morrow or the next week, was not worth that sum by 20 per cent. more or less, as the case may be, unless they also found the parties had agreed that the principal, by whose orders all this was done, had graciously agreed to bear the loss!

The instruction places all risk upon the agent, unless the parties had agreed to the contrary. The very reverse of this is law and reason—that the loss is the principal's unless the parties agree otherwise.

Where the jury have found that the agent obeyed his principal's instructions, whether express or implied, from the usages and customs of business at that time and place, the law declares that he is free from all liability for loss to the principal, growing out of that manner of transacting the business, and the jury should have been told so.

The court below tacitly assumed, in this instruction, that the parties were dealing in depreciated bank bills, and that their rights and liabilities were not those usually existing between a bank and its correspondents, when it told the jury that the coin value of the currency, at the time it was paid to plaintiff, was the measure of damages in case of a failure to pay it to the principal, in the absence of any other agreemeent; for if it had no right to take currency at all, and did take and give up the notes it held for collection, then it was liable for the value of those notes at that instant.

But it was authorized to give up the notes on receiving the amount due upon them in currency; it was authorized to hold that currency until a demand was made for it, and it incurred no liability for loss to its principal, until it had become the cause of such loss, by its misconduct.

We earnestly insist that this case shall be determined by its own merits and the application of legal principles, that will secure both parties their rights, and not by rules and principles which are the growth of a different state of financial affairs.

When parties deal in money, by money let their rights be measured. When they deal in a depreciated currency, changing in value daily; when each party knows this; when they are but part of a great community using the same currency, as the only circulating medium it has, and this currency, without the act or fault of either of these parties or of that community, breaks down and goes out of use, and another currency of greater value takes its place, the rights of the parties, as to the old transactions, should be adjusted by the old agreements.

It is a fraud on the collecting bank to direct it to receive such currency, and hold it, and when it has become useless, demand something else instead. The parties did not intend this at the time, and the court, when it sees the circumstances under which they dealt, will, we trust, require each party to bear the necessary consequences of its own acts, and that will require the Marine Bank to pay, and the Fulton County Bank to receive, the coin value of the currency collected for the latter at the time it was demanded, according to the instruction asked by the defendant below and refused by the court.

For further authorities upon the questions made in this case, we refer to the brief filed by us in the case of the *Marine Bank of Chicago* vs. *The Broadway Bank*, No. 193, on the docket at this term, and also to the distinctions noted at the close of that brief, between this case and those decided in the Supreme Court of Illinois, growing out of the same general transactions in Chicago in the Spring of 1861.

We call the attention of the court to the form of this action—case, against the agent for negligence, in this, that it gave up the notes of Cooley, Farwell & Co. and H. W. Hunt & Co., without receiving payment of them.

The proof is, that it did receive payment of them, and in the manner authorized by its principal, which answers the gist of those counts; another count charges the agent with receiving depreciated bank bills in payment of those notes.

The proof is that it did so, and by direction of the principal.

This answers the whole declaration; but if the court shall be of the opinion that, under this form of action, the plaintiff below can recover the proceeds of those collections, then, as argued heretofore, it is only entitled to the actual value of that currency at the time of demand made for its payment, and as the court below adopted a different rule of damages, unjust and oppressive towards the plaintiff in error, the judgment should be reversed for the errors in giving and refusing the instructions found on page 21 of the Record.

SAM. W. FULLER,
For Pl'ff in Error.

THOS. HOYNE,
Of Counsel.

Chicago, Feb. 3, 1864.

IN THE

SUPREME COURT OF THE UNITED STATES,

No. 192.

MARINE BANK OF CHICAGO, PLAINTIFF IN ERROR,

vs.

THE FULTON COUNTY BANK, DEFENDANT IN ERROR.

SUPPLEMENT TO BRIEF AND ARGUMENT BY DEFENDANT IN ERROR.

The brief and argument in the above entitled case, was made and filed prior to the receipt of the brief and argument on the part of the plaintiff in error; we, therefore, beg leave to offer a few more suggestions on the part of the defendant in error.

Mr. Fuller, in his printed argument in this case, states, generally, the pleading to be in case, and charges the defendant below with neglect of duty, etc., and on page eighteen, he calls the attention of the court to the form of the action—it being case against the agent for negligence, etc., and seems to desire the court to consider the questions at issue in that form of action. In our argument filed in this case, on page one, we stated that the two suits were consolidated and tried as one, as in an action of assumpsit for money had and received, which we now understand to be the fact.

The record, on page eleven, shows such to be the fact. The bill of exception made by plaintiff in error is so entitled. We have so treated the case in our argument, and presume that the fact escaped the attention of counsel.

The record seems to be, to some extent, informal, as the clerk states in the caption for a new trial—"case," instead of "assumpsit," and omitted to state in the proceedings that the two cases, after being consolidated, were tried in an action of assumpsit; counsel must have understood the fact as we did, as he so treated the case in his bill of exceptions. This informality should not now make against the defendant in error, as no objection was made, and this case was tried for convenience of counsel, upon the same general line of facts as the other cases which were originally brought in assumpsit.

Counsel for plaintiff in error makes two points, which are in substance as follows:

1. What authority had the Marine Bank to receive the depreciated currency of Illinois in payment of those notes?

2. What right had the Marine Bank to retain the proceeds of those collections until April, 1862.

We submit, if the court please, that we fully answered the first question here asked, which will be found on pages twelve and thirteen of our argument, now on file.

Counsel says in his argument, page five: "To answer the first "question, we will look carefully into the evidence," and then refers to the circular of December 8th, 1860, page thirteen of the record.

It is certainly very difficult for us to see the authority in this circular, as claimed by counsel; that is, authority to receive depreciated currency of Illinois in payment of the notes sent for collection.

The notes of Cooley, Farwell & Co., and H. W. Hunt & Co., were sent out April 10th, 1861, four months after the circular was

issued. The letter enclosing the notes will be found to contain the ordinary instructions to collect, and without special instructions or authority to take the paper of Illinois banks. It was the duty of the plaintiff in error to take par funds, such funds as would give the defendant in error the amount of the debt, and not a part only. It cannot be said that the defendant in error, at the time the notes were sent out, had any knowledge of the circular of December 8th, 1861. There is no proof that the defendant ever received the circular, or heard of it; and certainly it cannot be said that a contract can be made, in this day, to charge the defendant in error with authority to the plaintiff in error to take depreciated Illinois currency upon this circular, issued four months prior to the letter enclosing the notes in the ordinary manner in such cases, and without any special instructions and authority, upon the testimony of a clerk of the plaintiff, that he mailed a copy of the circular of December 8th, and April 20th, would, as it seems to us, be a great enlargement upon the true meaning of the circular. It would be giving to the circular the effect of a contract, as claimed by certain stage companies in advertising baggage at the risk of the owner, without consent on the part of the passengers.

But, we submit, that the circular of December 8th, 1860, can have no effect whatever, even if the proof did show that it had been received by the defendant in error, in due course of mail, because the instructions contained in the letter endorsing the notes must govern. The letter did not state that the collections might be made according to the circular of December 8th, or anything showing that the defendant understood that collections were being made in depreciated paper.

It will be borne in mind that the circular of April 20th, was issued sometime after the notes were sent out for collection, and does not state that notes of less than par value will be received in payment of notes sent out for collection.

The cicular refers to the scarcity of exchange, condition of the country, and that the plaintiff in error would be obliged to place

all currency funds to the credit of defendant, in such currency as received in Chicago, to be drawn for in like bills, etc., etc. We do not think the effect of this circular, in any way, can be said to be a notice that the plaintiff in error would receive depreciated paper in payment of defendant's claims sent out for collection, and that nothing better could be obtained at that time. The circular, we think, most clearly intended simply to advise parties of the fact that exchange could not be obtained, and, therefore, the collections would be placed to their credit, that the plaintiff in error would, by its own act, become debtor to the defendant for the amount, until such time as exchange could be obtained. This is all, and the extent of the notice.

Counsel says that these circulars were "explicit notices to the "parties that currency used at Chicago was exclusively bills of "Illinois banks; that it was depreciated from 8 to 10 per cent. on "the 8th December, 1860, and more so April 20, 1861."

Now, if the court please, we fail to see anything in either circular to the effect that currency in Chicago had depreciated 8 to 10 per cent when the notes in question were collected, nor at the time the circulars were issued. The circular of December 8th states that rates of exchange had advanced to 8 to 10 per cent for such funds as are current here; that the supply of exchange diminished daily. There is a wide difference between the rates of exchange advancing and currency depreciating. Why did not the plaintiff in error state that the notes of Illinois banks were becoming valueless; that the paper was not par? instead of stating that exchange was scarce, and in consequence of that the rates were advancing.

Counsel states that his last question is fully answered by the letter of the cashier of the defendant in error of date May 1, 1861. This letter will be found on page 17 of the record, and is in these words:

"Please hold the avails of the collections I have sent you sub-"ject to my orders, and advise the amount credited on H. W. "Hunt & Co.'s note, due 4th inst. It is payable with exchange."

If counsel can find any authority in this letter to hold depreciated paper at the risk of the defendant he has not yet pointed it out. The authority contained in the letter, to give it the most liberal intepretation, is to the effect that credit may be given for the proceeds of collections, and to hold the amount as debtor of the bank, subject to the order of the cashier. Such must have been the understanding of both parties, and most certainly the plaintiff in error, as the letters of Mr. Dox, on pages 12 and 13 of the record show.

The letter of May 1, 1861, states that the account of the defendant had a credit, Cooley, Farwell & Co., $2,000, and May 6, 1861, the account had a credit, $1,037.85, $94.35 collected as exchange.

If these letters had contained advices that the amount was not worth to exceed 90 per cent. and going down daily, the defendant would have had an opportunity to protect itself. But nothing of the kind; on the contrary, the advice was that a credit had been given for so many dollars, and that the plaintiff had become a debtor to that amount, subject to the order of the cashier of the defendant.

The proof shows that the plaintiff, during all this time, assorted the currency, retaining for its own use the best, and paying out the poorest, and may have received on the notes in question paper on which it realized nearly par. After this, the plaintiff was not satisfied, and refused to pay; and now we are told by counsel that it is a fraud on the collecting bank to direct it to receive such currency and hold it, and when it has become useless demand something else instead. We might agree with counsel in his statement as to the wrong, provided there was a shadow of proof to show that defendant directed the receipt of depreciated paper, and to hold the depreciated paper at the risk of the defendant. By what process counsel has been able to arrive at the conclusion that defendant directed the collection in such funds, or consented to it, and now demands something better instead, we are unable to say. We can but think it the result of starting upon incorrect premises, in the first place, and has been compelled to arrive at such conclusions from the effects of standing upon a sandy foundation.

Counsel says that the authority to receive this currency in payment of collections was also derived from the usage and course of business at Chicago at the time. To sustain this doctrine counsel refers to Story on Agency, secs. 77, 86, 96, 225, 226.

In this, counsel certainly assumes a more difficult position than the one taken in regard to authority appearing in the circular.

Justice STORY says, in sec. 77, that usages of a particular trade or business are not admissable to enlarge the powers of the agent, but to interpret those powers which are actually given. We suppose counsel understands from this authority, that the plaintiff in error had a right to be governed by the usage or custom of bankers in Chicago, in relation to the currency of Illinois banks, and that it had a right to receive depreciated currency, although the defendant gave no authority, for the reason, the bankers here did take such paper in certain cases.

If counsel intends to have this court believe, and to have us understand, that the custom of the bankers at Chicago, at that time, gave authority to the plaintiff to receive depreciated paper, then we beg leave to protest, and to say that, there is not any authority to sustain the position, unless it is the 3d Barth, 125; the case cited by Chief Justice Caton in a separate opinion in the 27th Ill., 506. We do not think the proof shows such a universal custom existing in Chicago, at the time, as was shown to exist among the native tribes of the head waters of the Niger, when Kurdi shells were used as currency. The proof was positive, that the usage or custom of bankers at the time was not uniform; that, in fact, there were severeral lists; the short list and the long list; some bankers took one list and discounted the other as worthless, and others took both lists, that is, took the notes of the banks not thrown out altogether. The plaintiff in error took the long list; so, it appears, that such was not the custom of all the banks and bankers at the time, and was not universal.

The 86 Sec. of Story, on Agency, does not in any way help counsel. There is no dispute about the fact that the plaintiff in error

had authority, and was expected to transact the business of its agency by the forms, and by the instruments, and according to the laws of Chicago at the time. We will take no more time in following counsel in this position, for the reason the case under consideration does not show general usage or custom, and does not, in the least, justify the application of the rules of law cited by counsel. This is not a case of general agency. The agency was a special one; the authority delegated was to do a single act—to collect specific paper, and nothing further.

Counsel says that, "the only real question in the case is in regard " to the measure of damages," and insists that the plaintiff in error is only liable for the coin value of the currency received at the time of demand, and further insists that the court erred in refusing to instruct the jury to that effect.

It is true, if the court please, that the only question that could exist upon the trial was, as to the amount of damages the plaintiff below was entitled to recover udon the proofs. The case was fully proved, and, by the testimony of Mr. Dox, it fully appeared that the plaintiff in error was, on the 1st day of May, 1861, debtor to the defendant in error in the amount of $2,000, and on the 6th of May, 1861, debtor in the sum of $1,037.85, making $3,037.85, for which judgment should have been rendered, instead of that amount, the jury gave a verdict for $2,977.84. The amount, as we understood, was arrived at, by not allowing $94.35, which was collected as exchange, and allowing $34.34 interest after the demand up to the time of trial. The testimony of Mr. Dox shows that the kind of paper received in this case was worth, at the time, 90 to 95 cents on the dollar, (page 21 of record), $200 remittance being entered, which was about seven per cent. upon the amount collected without the exchange, being the amount to coin value at the time it was received, to meet the views of the court as to what was considered equity.

The stipulation, on page 12 of the record, shows that the demand was made for the amount of the two notes and refused. No proof

showing any offer to deliver paper of like kind received, nor its value.

There was no proof showing that the paper received had been held as authorized in the letter of May 1st, 1861. No proof offered to show what the actual value of the paper received was at the time of the demand. It nowhere appears what particular bank notes were received. The plaintiff below proved the amount of the debt from the letters of the cashier, which proof was sufficient to charge the plaintiff in error with the whole amount in the absence of proof showing what paper was received, and what its value in fact was at the time of the demand. We, therefore, submit that if the position of counsel here taken is correct, then, from the proof, the plaintiff below should have recovered the amount fixed by the jury, if not the amount of $94.35 in addition, as the wrongful act of the defendant below, rendered it liable to pay the full amount placed to the credit of the account of the plaintiff below, as advised by the letters of Mr. Dox.

E. S. SMITH,

for Defendant.

IN THE

SUPREME COURT OF THE UNITED STATES,

No. 192.

MARINE BANK OF CHICAGO, PLAINTIFF IN ERROR,

vs.

THE FULTON COUNTY BANK, DEFENDANT IN ERROR.

SUPPLEMENT TO BRIEF AND ARGUMENT BY DEFENDANT IN ERROR.

The brief and argument in the above entitled case, was made and filed prior to the receipt of the brief and argument on the part of the plaintiff in error; we, therefore, beg leave to offer a few more suggestions on the part of the defendant in error.

Mr. Fuller, in his printed argument in this case, states, generally, the pleading to be in case, and charges the defendant below with neglect of duty, etc., and on page eighteen, he calls the attention of the court to the form of the action—it being case against the agent for negligence, etc., and seems to desire the court to consider the questions at issue in that form of action. In our argument filed in this case, on page one, we stated that the two suits were consolidated and tried as one, as in an action of assumpsit for money had and received, which we now understand to be the fact.

The record, on page eleven, shows such to be the fact. The bill of exception made by plaintiff in error is so entitled. We have so treated the case in our argument, and presume that the fact escaped the attention of counsel.

The record seems to be, to some extent, informal, as the clerk states in the caption for a new trial—"case," instead of "assumpsit," and omitted to state in the proceedings that the two cases, after being consolidated, were tried in an action of assumpsit; counsel must have understood the fact as we did, as he so treated the case in his bill of exceptions. This informality should not now make against the defendant in error, as no objection was made, and this case was tried for convenience of counsel, upon the same general line of facts as the other cases which were originally brought in assumpsit.

Counsel for plaintiff in error makes two points, which are in substance as follows:

1. What authority had the Marine Bank to receive the depreciated currency of Illinois in payment of those notes?

2. What right had the Marine Bank to retain the proceeds of those collections until April, 1862.

We submit, if the court please, that we fully answered the first question here asked, which will be found on pages twelve and thirteen of our argument, now on file.

Counsel says in his argument, page five: "To answer the first "question, we will look carefully into the evidence," and then refers to the circular of December 8th, 1860, page thirteen of the record.

It is certainly very difficult for us to see the authority in this circular, as claimed by counsel; that is, authority to receive depreciated currency of Illinois in payment of the notes sent for collection.

The notes of Cooley, Farwell & Co., and H. W. Hunt & Co., were sent out April 10th, 1861, four months after the circular was

issued. The letter enclosing the notes will be found to contain the ordinary instructions to collect, and without special instructions or authority to take the paper of Illinois banks. It was the duty of the plaintiff in error to take par funds, such funds as would give the defendant in error the amount of the debt, and not a part only. It cannot be said that the defendant in error, at the time the notes were sent out, had any knowledge of the circular of December 8th, 1861. There is no proof that the defendant ever received the circular, or heard of it; and certainly it cannot be said that a contract can be made, in this day, to charge the defendant in error with authority to the plaintiff in error to take depreciated Illinois currency upon this circular, issued four months prior to the letter enclosing the notes in the ordinary manner in such cases, and without any special instructions and authority, upon the testimony of a clerk of the plaintiff, that he mailed a copy of the circular of December 8th, and April 20th, would, as it seems to us, be a great enlargement upon the true meaning of the circular. It would be giving to the circular the effect of a contract, as claimed by certain stage companies in advertising baggage at the risk of the owner, without consent on the part of the passengers.

But, we submit, that the circular of December 8th, 1860, can have no effect whatever, even if the proof did show that it had been received by the defendant in error, in due course of mail, because the instructions contained in the letter endorsing the notes must govern. The letter did not state that the collections might be made according to the circular of December 8th, or anything showing that the defendant understood that collections were being made in depreciated paper.

It will be borne in mind that the circular of April 20th, was issued sometime after the notes were sent out for collection, and does not state that notes of less than par value will be received in payment of notes sent out for collection.

The cicular refers to the scarcity of exchange, condition of the country, and that the plaintiff in error would be obliged to place

all currency funds to the credit of defendant, in such currency as received in Chicago, to be drawn for in like bills, etc., etc. We do not think the effect of this circular, in any way, can be said to be a notice that the plaintiff in error would receive depreciated paper in payment of defendant's claims sent out for collection, and that nothing better could be obtained at that time. The circular, we think, most clearly intended simply to advise parties of the fact that exchange could not be obtained, and, therefore, the collections would be placed to their credit, that the plaintiff in error would, by its own act, become debtor to the defendant for the amount, until such time as exchange could be obtained. This is all, and the extent of the notice.

Counsel says that these circulars were "explicit notices to the "parties that currency used at Chicago was exclusively bills of "Illinois banks; that it was depreciated from 8 to 10 per cent. on "the 8th December, 1860, and more so April 20, 1861."

Now, if the court please, we fail to see anything in either circular to the effect that currency in Chicago had depreciated 8 to 10 per cent when the notes in question were collected, nor at the time the circulars were issued. The circular of December 8th states that rates of exchange had advanced to 8 to 10 per cent for such funds as are current here; that the supply of exchange diminished daily. There is a wide difference between the rates of exchange advancing and currency depreciating. Why did not the plaintiff in error state that the notes of Illinois banks were becoming valueless; that the paper was not par? instead of stating that exchange was scarce, and in consequence of that the rates were advancing.

Counsel states that his last question is fully answered by the letter of the cashier of the defendant in error of date May 1, 1861. This letter will be found on page 17 of the record, and is in these words:

"Please hold the avails of the collections I have sent you sub-"ject to my orders, and advise the amount credited on H. W. "Hunt & Co.'s note, due 4th inst. It is payable with exchange."

If counsel can find any authority in this letter to hold depreciated paper at the risk of the defendant he has not yet pointed it out. The authority contained in the letter, to give it the most liberal intepretation, is to the effect that credit may be given for the proceeds of collections, and to hold the amount as debtor of the bank, subject to the order of the cashier. Such must have been the understanding of both parties, and most certainly the plaintiff in error, as the letters of Mr. Dox, on pages 12 and 13 of the record show.

The letter of May 1, 1861, states that the account of the defendant had a credit, Cooley, Farwell & Co., $2,000, and May 6, 1861, the account had a credit, $1,037.85, $94.35 collected as exchange.

If these letters had contained advices that the amount was not worth to exceed 90 per cent. and going down daily, the defendant would have had an opportunity to protect itself. But nothing of the kind; on the contrary, the advice was that a credit had been given for so many dollars, and that the plaintiff had become a debtor to that amount, subject to the order of the cashier of the defendant.

The proof shows that the plaintiff, during all this time, assorted the currency, retaining for its own use the best, and paying out the poorest, and may have received on the notes in question paper on which it realized nearly par. After this, the plaintiff was not satisfied, and refused to pay; and now we are told by counsel that it is a fraud on the collecting bank to direct it to receive such currency and hold it, and when it has become useless demand something else instead. We might agree with counsel in his statement as to the wrong, provided there was a shadow of proof to show that defendant directed the receipt of depreciated paper, and to hold the depreciated paper at the risk of the defendant. By what process counsel has been able to arrive at the conclusion that defendant directed the collection in such funds, or consented to it, and now demands something better instead, we are unable to say. We can but think it the result of starting upon incorrect premises, in the first place, and has been compelled to arrive at such conclusions from the effects of standing upon a sandy foundation.

Counsel says that the authority to receive this currency in payment of collections was also derived from the usage and course of business at Chicago at the time. To sustain this doctrine counsel refers to Story on Agency, secs. 77, 86, 96, 225, 226.

In this, counsel certainly assumes a more difficult position than the one taken in regard to authority appearing in the circular.

Justice STORY says, in sec. 77, that usages of a particular trade or business are not admissable to enlarge the powers of the agent, but to interpret those powers which are actually given. We suppose counsel understands from this authority, that the plaintiff in error had a right to be governed by the usage or custom of bankers in Chicago, in relation to the currency of Illinois banks, and that it had a right to receive depreciated currency, although the defendant gave no authority, for the reason, the bankers here did take such paper in certain cases.

If counsel intends to have this court believe, and to have us understand, that the custom of the bankers at Chicago, at that time, gave authority to the plaintiff to receive depreciated paper, then we beg leave to protest, and to say that, there is not any authority to sustain the position, unless it is the 3d Barth, 125; the case cited by Chief Justice Caton in a separate opinion in the 27th Ill., 506. We do not think the proof shows such a universal custom existing in Chicago, at the time, as was shown to exist among the native tribes of the head waters of the Niger, when Kurdi shells were used as currency. The proof was positive, that the usage or custom of bankers at the time was not uniform; that, in fact, there were severeral lists; the short list and the long list; some bankers took one list and discounted the other as worthless, and others took both lists, that is, took the notes of the banks not thrown out altogether. The plaintiff in error took the long list; so, it appears, that such was not the custom of all the banks and bankers at the time, and was not universal.

The 86 Sec. of Story, on Agency, does not in any way help counsel. There is no dispute about the fact that the plaintiff in error

had authority, and was expected to transact the business of its agency by the forms, and by the instruments, and according to the laws of Chicago at the time. We will take no more time in following counsel in this position, for the reason the case under consideration does not show general usage or custom, and does not, in the least, justify the application of the rules of law cited by counsel. This is not a case of general agency. The agency was a special one; the authority delegated was to do a single act—to collect specific paper, and nothing further.

Counsel says that, "the only real question in the case is in regard "to the measure of damages," and insists that the plaintiff in error is only liable for the coin value of the currency received at the time of demand, and further insists that the court erred in refusing to instruct the jury to that effect.

It is true, if the court please, that the only question that could exist upon the trial was, as to the amount of damages the plaintiff below was entitled to recover udon the proofs. The case was fully proved, and, by the testimony of Mr. Dox, it fully appeared that the plaintiff in error was, on the 1st day of May, 1861, debtor to the defendant in error in the amount of $2,000, and on the 6th of May, 1861, debtor in the sum of $1,037.85, making $3,037.85, for which judgment should have been rendered, instead of that amount, the jury gave a verdict for $2,977.84. The amount, as we understood, was arrived at, by not allowing $94.35, which was collected as exchange, and allowing $34.34 interest after the demand up to the time of trial. The testimony of Mr. Dox shows that the kind of paper received in this case was worth, at the time, 90 to 95 cents on the dollar, (page 21 of record), $200 remittance being entered, which was about seven per cent. upon the amount collected without the exchange, being the amount to coin value at the time it was received, to meet the views of the court as to what was considered equity.

The stipulation, on page 12 of the record, shows that the demand was made for the amount of the two notes and refused. No proof

showing any offer to deliver paper of like kind received, nor its value.

There was no proof showing that the paper received had been held as authorized in the letter of May 1st, 1861. No proof offered to show what the actual value of the paper received was at the time of the demand. It nowhere appears what particular bank notes were received. The plaintiff below proved the amount of the debt from the letters of the cashier, which proof was sufficient to charge the plaintiff in error with the whole amount in the absence of proof showing what paper was received, and what its value in fact was at the time of the demand. We, therefore, submit that if the position of counsel here taken is correct, then, from the proof, the plaintiff below should have recovered the amount fixed by the jury, if not the amount of $94.35 in addition, as the wrongful act of the defendant below, rendered it liable to pay the full amount placed to the credit of the account of the plaintiff below, as advised by the letters of Mr. Dox.

E. S. SMITH,

for Defendant.

Supreme Court of the United States.

DECEMBER TERM, 1863.

No. 192.

MARINE BANK OF CHICAGO,

Plaintiff in Error.

VS.

THE FULTON COUNTY BANK,

Defendant in Error.

IN ERROR TO CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

E. S. SMITH, ATTORNEY FOR DEFENDANT IN ERROR.

S. W. FULLER, ATTORNEY FOR PLAINTIFF IN ERROR.

CHICAGO:

BEACH & BARNARD, PRINTERS, 14 SOUTH CLARK STREET.

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STATEMENT BY DEFENDANT IN ERROR.

The defendant in error, brought two suits in the court below, in case to recover damages sustained against the plaintiff in error, for not collecting, in money, the amount of two notes remitted said plaintiff for collection. One of the suits was for the amount of a note of H. W. Hunt & Co., for $943 50, and the other suit for the amount of a note of Cooley, Farwell & Co., for $2,000 00, which two suits, on motion of plaintiff in error, were consolidated and tried as one suit, as in an action of assumpsit for money had and received.

The suit was tried July 3d, 1862, and verdict for the defendant in error, for $2,977 84. On motion for a new trial by defendant below, and on intimation of the court, the plaintiff remitted $200, and judgment was thereupon entered upon the verdict for $2,777 84, and costs.

The remittiter was made to allow the judgment to be entered for the value of the currency, in coin, at the time of the collection made by the defendant below, to conform to what the court considered the equity of the case.

POINTS BY THE DEFENDANT IN ERROR.

I.

It was the duty of the plaintiff in error (the agency being special) to collect the paper, in coin, or in current par funds, and to account and pay over such funds without delay.

II.

The amount collected by the plaintiff, on the bills of the defendant, having been mixed with the funds of the plaintiff, and the same being credited as money to the account of defendant, the plaintiff became liable to pay so much money, with interest, from the date of the credit.

III.

There is no error against the plaintiff in error, in the instruction given by the court to the jury, to which the plaintiff excepted.

IV.

There is no error in the refusal, by the court, to give the instruction asked by the plaintiff in error, for the reason, there is no proof in the case to warrant such instruction.

May it please the court,

The errors assigned, by the plaintiff, in this record, are directed wholly to the instructions given and refused by the court, and, in order to a full understanding of the points made by the plaintiff, we deem it necessary to consider the proof in the case.

The letter of the defendant in error, April 10th, 1861, enclosing the paper for collection, contains the usual simple instructions for the plaintiff to collect. The reply of the plaintiff in error, April 13th, 1861, acknowledged the receipt of the notes, and promise attention. (Page 12.)

There can be no question whatever, as to how the parties understood each other, at that time. The duty of the agent was too well known, at this time, to require of the defendant in error any other instructions than those contained in the letter of Mr. McLaren, its cashier.

The letter from Mr. Dox to the defendant in error, dated May 1st, 1861, acknowledges a credit for collection of the Cooley, Farwell & Co's note for $2,000 (page 12). Mr. Dox's letter to the defendant, dated May 6th, 1861, acknowledges account credit for

collection of the H. W. Hunt & Co's note for $943 50, and $94 35 exchange, making $1,037 85 (page 13.)

The stipulation on page 11 and 12, proved demand by defendant in error, upon plaintiff in error, April 21st, 1862, for the amount of the two collections and refusal, by plaintiff to pay.

The plaintiff below proved, by H. W. Hunt, that the note of his firm in question, was paid to the defendant below in currency. He thought in Illinois currency. He could not say that the currency was the same kind taken by the Merchants' Loan & Trust Co. Bank in Chicago. He paid exchange on New York. Witness said his firm had to sort the currency to deposit at the Merchants' Savings, Loan & Trust Co. His impressions was, that he paid the note without assorting the currency. The currency which the Merchants' Savings, Loan & Trust Comany would not receive, was changed for other currency.

The witness, on cross-examination, said: If we thought a man's note better than the money, we did not take it; if we thought the money better, we took it. We told our customers generally, that the money was not good. I think that this kind of money was about all the currency we had through the winter. This money one time depreciated, and went down very rapidly, (page 14.)

The testimony of Mr. Farwell is, in substance, as follows:

I remember the note for $2,000 which was sent for collection to the Marine Bank of Chicago. It was due May 1-4, 1861. It was paid April 30th, 1861. This is the check given for it. We kept our bank account at the Western Fire & Marine Insurance Co. of Chicago. We had a small account with the Merchants' Savings, Loan & Trust Co. We could not get exchange with the currency. I think we paid 10 per cent. for exchange, in this currency. Currency was then depreciated. We did assort our funds, and deposited different lists with different Banks. All the funds deposited with the Western Fire & M. Ins. Co. was shorter, and much more more depreciated than that which would be received by the Merchants' Savings, Loan & Trust Co. This check was drawn paya-

ble in currency, and the currency was worth less than one hundred cents on the dollar. I think the currency was taken from the bank, and carried to the Marine Bank, and paid there.

The witness, on cross-examination, said:

The currency deposited at the Merchants' Savings, Loan & Trust Co. was such as we received for goods. We are large wholesale dealers in dry goods. The Merchants' Savings, Loan & Trust Co. declined selling exchange on New York at 10 per cent. My impression is, that on April 30, 1861, the money received at the Merchants' Savings, Loan & Trust Co. was a shorter list than those received at other banks. I think that all banks that would sell exchange, sold it at 10 per cent. I think that Adsit, Aiken, and Dunham, discriminated in regard to the money, (page 15.)

The witness, on re-direct examination, said:

We did make a difference in price, when we sold goods for this kind of currency. We did take this kind of money on our notes, for we were obliged to take it. We did refuse, in two or three instances, to take this currency. We called country notes as bad as this currency, at that time.

On further cross-examination, he said:

It was about this time, we refused to take this currency. About the middle of May, this currency was not taken. I did not sign the banker's agreement to take this currency while the war lasted. I. H. Burch also refused to receive this currency. These bankers had been doing a large business. Burch, Aiken and Adsit, must necessarily have been doing a small business. Hoffman & Gelpcke, the Marine & Fire Insurance Co, Tucker, and Carver, all did a large business in this currency (pages 15, 16.)

The plaintiff below called J. H. Woodworth, who testified as follows:

I am the President of the Western Marine & Fire Insurance Co., and was April and May, 1861. At that time the currency received by us was Illinois bank bills. There might have been a little in

circulation which had nearly a par value. There was one bank at Galena; one at Bloomington. On the 1st and 4th of May, 1861, hardly any two banks were of the same value. There were one or two banks in Chicago that took a less number of bank bills. When we received an amount of bank bills, sometimes we assorted; the banks were in the habit of paying out the poorest currency, to some extent. On May 1st, 1860, gold bought exchange at ½ per cent.; bills of the State Bank of Iowa at from ½ to 2 per cent.; the bills of the Marine Bank of Chicago at about the same. Exchange was about 10 per cent. for currency; this was the common price.

The witness, on cross-examination, said: The check of Cooley, Farwell & Co. would at that time have paid a note sent to us for collection. The bills of the Bank of Bloomington made no appreciable amount of the circulation (page 16.)

The plaintiff below called Mr. Adsit, who testified:

I am a banker in Chicago, and have been for two years. I know how money matters were in Chicago in 1861. Some banks made a difference in bank bills; there was a select list and an indiscriminate list. The Chicago Marine & Fire Insurance Co. used the latter list. When we received the bills on the long list we marked them select. For collections from the East, towards the last, I refused to receive Illinois currency. The Merchants' Loan & Trust Co. had a short list.

Mr. Adsit, on cross-examination, said:

The great body of the circulation on the last of April and the first of May, 1861, was Illinois currency; that which was paid out by the banks was the poorest, and the best was kept (page 16.)

On re-direct, Mr. Adsit said:

The holding of the select list by the banks accounts for its absence.

The plaintiff then gave in evidence the note of Hunt & Co. and Cooley, Farwell & Co. (page 17.)

The defendant below called Mr. Ellsworth, who testified as follows:

I have been a banker in Chicago three or four years. I know the value of Illinois bank bills. The value of the currency used in April and May, 1861, was about from 70 to 72 cents. These were the bills in use in general circulation. The notes of the Illinois banks were generally received. I never saw any Wisconsin, Ohio or Indiana bills for two months. When I wanted good money, I bought it. When I bought bills of Indiana banks with Illinois currency, I paid ten per cent. premium (page 16.)

The defendant below then gave in evidence, by the stipulation (page 17), the printed circulars, so called, marked Exhibits A and B, December 8th, 1860 and April 20th, 1861 (page 13.) Also, a letter from the plaintiff below, dated May 1st, 1861, which letter requested the defendant below to hold the avails of the collections sent subject to orders, and advise the amount credited on H. W. Hunt & Co.'s note payable with exchange.

The defendant then called H. B. Dox, who testified as follows:

In April and May, 1861, I was cashier of the Marine Bank of Chicago. I have heard the testimony this morning, and have seen the letters which have been introduced. Ten per cent. exchange was collected on the $943.50 Hunt note in currency. It was the current rate for Illinois currency. This currency was the same as received by us for our debts and other collections sent us in the absence of express instructions. It takes about three days for a letter to go from Chicago to Gloversville.

Cross-examination of Mr. Dox by plaintiff below:

The funds received on these collections were mixed with the other funds of the bank. April 21, 1862, there was par currency in circulation in Chicago.

Examination of Mr. Dox by defendant below:

I know what was the circulating medium of Chicago during the Fall of 1860, and the Winter and Spring of 1861, and what was the meaning of the word currency, as used during the last five or six years in Chicago and vicinity.

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The word "currency" meant the bills of free banks of Illinois and Wisconsin, and which were always distinguished from coin and from the bills of other States than Illinois and Wisconsin.

In the fall of 1860, and until April, 1861, the currency in use for all business transactions at Chicago and vicinity was the bills of the free banks of Illinois and Wisconsin.

After the first of April, 1861, and until May 18th, 1861, the currency or paper in circulation was almost wholly composed of the issues of the free banks of Illinois.

As compared with coin or exchange on New York, this currency was always a depreciated currency. It was of fluctuating and uncertain value. Soon after the election in November, 1860, it began to depreciate in value. In November and December, 1860, it was from five to ten per cent. discount for coin.

The bills of the different banks differed greatly in value at the same time. Their values depended upon the New York market value of the stocks deposited for security of the bills; and the value of different bank notes in circulation as "currency" in the fall of 1860, and winter following, and in the spring of 1861, was not uniform, some being worth more than others.

In November, 1860, the bills of nine of the Illinois banks became so much depreciated in value, that they were thrown out or rejected by the banks and the community, and ceased to be used as currency.

After this, the remaining bills that were used as currency fluctuated in value, from 5 to 10 per cent. discount for coin, until the first of April, 1861, when thirty more of the bills of the Illinois banks were thrown out, or rejected, and no longer used as currency.

After April 1st, 1861, there ware about $6,500,000 of the bills of the Illinois banks in circulation, which was almost the sole circulating medium until May 18th, 1861, when this currency had depreciated so much that it was no longer used as currency. It had then depreciated from 10 to nearly 50 per cent. from coin. Some of the banks were then but little depreciated. The

bills of the Marine Bank, the Bank of Galena, Bank of Ottawa, and two or three others, were, on the 18th of May, 1861, not so much depreciated, and were worth 90 cents to par. But these banks had only a very small circulation, say from $60,000 to $70,000, out of an entire circulation of nearly $6,500,000, and the bills of these banks had not, for nearly a year before, formed any appreciable part of the circulation in use as money.

During all the time I have been in the banking business at Chicago, there has been a distinction and difference noted between this currency and other kinds of money.

Where a depositor, or customer, made a deposit with a bank, this currency was entered as such in his bank book, and coin entered as such, and eastern funds as such, and the depositor drew it out as he paid it in, receiving gold for gold, and currency for currency, unless, as was often the case, he was allowed a premium for his gold, or eastern funds in currency, when he would draw out the whole in currency.

The currency, when deposited, was drawn out in like currency, unless gold or exchange on New York was specially called for, when the customer was charged the difference in value, at the time, between currency and gold, or exchange, which fluctuated from time to time.

This currency declined in value during the winter and spring of 1861. During all that time it was used in payment of debts, and in ordinary transactions of domestic business, as the circulating medium. We had hardly any other.

The collections, made by defendant, for plaintiff, were all made in this currency, or in checks upon banks payable in this currency. This was the currency referred to in our circular of December 8th, 1860.

We made all our collections for other parties, whether banks or private individuals, also in this currency, unless specially directed otherwise; and when we remitted to our eastern correspondents the proceeds of such collections, we charged them discount or dif-

ference between this currency and New York exchange, which varied from time to time.

New York exchange was always worth about ¼ or ½ of one per cent. more than coin.

The funds of the bank were all kept together, including its own—those received on deposit, and for collections—all went into one fund. This fund was made up of this Illinois currency. It is usual, and customary, for banks and bankers to keep all their funds together.

The defendant put the funds received on collections for plaintiff, with his own funds, in the usual way.

This currency, which was received in payment of the collections made by defendant for plaintiff, was worth from 90 to 95 cents on the dollar, at the time it was received by defendant.

It continued to depreciate in value until May 18th, 1861, as did all the like funds held by defendant, with which plaintiffs were mixed. After that date, it was no longer used as money, but was bought and sold as a commodity by the brokers, at from 10 to 55 per cent. discount.

At the time of the demand for payment made by the plaintiff in this case, this currency was worth about 60 or 65 cents on the dollar. By this is meant the avergage value of the bills which had been used as currency or money, and in which plaintiff's collections had been made during the winter and spring of 1861, and until May 18th, 1861.

The larger portion of these bills were secured by the bonds of the Southern or seceeded States. They had no other security than those bonds, except what might be got from the stockholders of the banks after the stocks were sold in New York, under the banking law of Illinois, which liability of the stockholders was not, by bankers, regarded in estimating the market value of the bills issued by the banks.

The word "currency," as used in this place, referred to such bank bills as passed current in the community for business purposes, and which were used as money in ordinary transactions; and these were principally bills issued by the banks of Illinois and Wisconsin.

The bills of all other banks than of these States, were worth more than those of Illinois and Wisconsin, and always brought a premium over these. There was but a limited amount of bills of other States in circulation, in the winter and spring of 1861.

(The plaintiff objected to all the foregoing evidence tending to show a usage, or custom, of the defendant and bankers in Chicago, and also as to the meaning attached to the word "currency;" which objection was overruled by the court, and the plaintiff below excepted.)

(The record, in this respect, is not full.)

The witness further said: The currency received by this defendant, in payment of the demands collected by it for the plaintiff, were, when collected, placed by it with the other funds of the defendant. The defendant kept all funds together, as well those held by it for others on deposit, or received from collections, and its own. And, from this common fund, it used, indiscriminately, whatever it had occasion for in the daily transaction of business. When the collections for the plaintiff were made, credit was given the plaintiff, as was the usual practice on the books of the defendant, for the amount in dollars.

This credit expressed the amount in dollars, which defendant had collected for plaintiff in currency, which, at the different times of the collections, were worth from 90 to 95 cents on the dollar, in coin. During the winter and spring months of 1861, and while the notes of the Illinois and Wisconsin banks were used as currency, the defendant, as well as the other banks and bankers in Chicago, sorted the currency, reserving the best, and paying out the poorest kinds, so that the latter class of bills were chiefly in use and circulation.

The only question to be considered from the proofs is, whether the defendant in error authorized the receipt of depreciated paper, or bills of the free banks of Illinois, in collections of the notes sent to the plaintiff in error.

The letter of Mr. McLaren endorsing the notes, contains the ordinary instructions, and nothing more (page 12.) In the absence

of authority to receive depreciated currency, or bills of the free banks of Illinois, it was the duty of the plaintiff in error to collect par funds, such as would give exchange in the one case, and in the other give exchange, less the current rate charged for exchange in funds.

An agent, in the absence of authority, must receive money, and account for money, and cannot claim the right to receive uncurrent funds unless authorized to do so. The usual commercial exchanges, as fixed by law, govern in the absence of direct authority. The receipt of depreciated paper which would not give exchange or par funds by an agent, would be a neglect of duty, and render the agent liable to his principal for all consequences.

The plaintiff in error claims that the circular of December 8th, 1860, in effect, notified the defendant in error that collections could be made only in depreciated paper; that it must be understood that currency in Chicago meant paper of Illinois banks greatly depreciated. We submit, may it please the court, that no such construction can be given to the circular. In the first place, it will be found that there is no evidence showing the receipt of the circular by the defendant in error. It may have been mailed and never received; in such case the defendant cannot be charged with knowledge of its contents. But we will for the present consider this circular as it is, for the purpose of a full understanding of its meaning.

The circular first refers to a former one, which had reference to a probable temporary interruption of remittances in exchange for collections made for eastern correspondents. It does not state what was the cause for supposing there would be an interruption of remittances. It may have been for want of a supply of exchange at the west to answer the demand. It is often the case at the season of the year after the close of lake navigation, that the demand for exchange is larger than the supply. It is well known that when the supply is far below the demand, high rates will not increase the supply to any very considerable extent. Sufficient exchange can only be obtained to answer the demand when shipments can be made to draw against to make exchange.

The circular states that the plaintiff found that the supply of eastern exchange diminished daily; that the amount was altogether unreliable; that rates had advanced to 8 and 10 per cent. for such funds as were current in Chicago.

Now, if the court please, there is nothing in this statement to show that the plaintiff was taking depreciated paper or bills of free banks of Illinois which were below par, nor that the condition of the exchange market was not the same on all bank paper in circulation in the west.

We ask, how could the defendant have understood from this part of the circular that there was no bank paper in circulation in Chicago except the free banks of Illinois, and that exchange could not be obtained because of the uncertain value of the paper? Such was not the reason given; the want of supply was the only cause given, and if this was true, then exchange could not have been obtained for gold in sufficient quantities to answer the demand. No eastern banker could have understood this circular to mean anything different from what we contend. Why did not the plaintiff say that Illinois paper formed almost the entire circulating medium, and that it differed in value as the stocks did on which it was based; that such paper would not buy exchange at any price, or something of the kind which would have been a notice on which other instructions could have been given, so that the defendant could have had an opportunity to protect its interest. We think this circular shows a great want of duty on the part of the plaintiff, if the defense set up is a true one. If it is the duty of an agent to to keep his principal fully advised of all facts and circumstances to his protection.

Counsel may say that this is not all of the circular, and we grant it, and find that the plaintiff states in the circular that: "We are "obliged, therefore, to notify you that for the present and until "further notice we shall place all funds received by us in payment "of your collections to your credit, in such currency as is received "here, unless otherwise instructed by you, to be drawn for only in "like currency." We ask why the plaintiff was obliged to notify

the defendant that the funds would be placed to its credit for the present and until further notified? Did the plaintiff say it was because the funds or the currency was not of par value; that the currency received by the plaintiff was depreciated and getting valueless? Nothing of the kind. It was because exchange could not be obtained, as the circular stated that the supply was altogether unreliable; that the demand was greater than the supply. Did the plaintiff say that the credit which would be given for collections would be anything less than dollar for dollar? Did the plaintiff say that the like currency to be drawn for was not par funds; that it had depreciated, and was daily depreciating, and that much of the like had been thrown out? Not a word of it. The words "funds" and "currency" were used as they were always used and understood, and meant par funds and par currency. This circular did not advise the defendant in error that the funds so received would be assorted, the best reserved and the poorest paid out, by which the circulating funds or currency would be growing no better fast? Did this plaintiff advise the defendant that they were receiving funds that other banks had refused, and would not receive, which the proof shows to be the fact. Did this plaintiff state that its practice or custom was to receive the short list, the indiscriminate list, much of which other banks did not receive, as testified to by the witnesses? Such was not the advice. "Cur-"rency as is received here; funds as are current here," were words used by the plaintiff in advices given to its principal in this instance, from which the defendant could not have imagined any such state of things as did exist in fact, and well known to the plaintiff.

We expect to be told by counsel that if the circular of December 8th, 1860, is not sufficient to raise a presumption of authority to receive depreciated currency, that there is another circular, a copy of which was mailed to the defendant, and that the defendant may have seen it, and that it is of date April 20, 1861 (page 13). We propose to consider this piece of evidence for a moment to see how far it would have been notice, to the defendant, had it been.

This circular first refers to the unusual scarcity of eastern exchange consequent upon the depreciation in price of the State bonds upon which the currency is based, and the disturbance in business caused by the political and revolutionary condition of the country; and for this reason it would be impossible to continue remittances to eastern correspondents with customary regularity. We do not see anything in this statement of the circular which points direct to the condition of the bills of Illinois banks, much less the currency in circulation in Chicago.

The State bonds may have been below par, and still the bills of the Illinois banks have been par, circulating dollar for dollar, as is generally understood by currency. Under the law there is another guarantee to the bill holder besides the stocks pledged, which may have served to make the bills par, as was the case in several instances.

The causes mentioned in the circular tended to make exchange scarce—the demand greater than the supply—is what the plaintiff said. There is not any notice in this circular to the effect that when the plaintiff should remit, that the amount to the credit of the defendant would be subject to any discount for the depreciation of the paper. Not one word as to loss by depreciation, what had already taken place and was daily taking place. How, then, can it be said by the plaintiff in good faith that there was authority given by the defendant to receive at its risk such paper as the plaintiff had seen fit to take in payment of the bills intrusted to its care for collection?

The remaining portion of this circular is a copy of the other, with one exception, and the remarks made upon that will apply to this with renewed force, for the reason that four months and twelve days had intervened, during which time the bills of thirty banks had ceased to exist or be used, and the bills of other banks had been for months assorted by every banker, which process had given to the currency a name which has become history. Good faith, most certainly, at that time—April 20, 1861—would have required

of the plaintiff some information by which the defendant could have had an opportunity to protect its interests in that respect.

That other portion of the circular which we before excepted is the statement that the currency received in Chicago at that time was exclusively bills of the Illinois banks secured upon State stocks.

This statement was not strictly correct, as there were other bank paper in circulation in Illinois and in Chicago in considerable amount. But suppose the currency had been exclusively Illinois banks. Mark how could this statement have notified the defendant that its collections would be made in greatly depreciated paper, and the credits given therefor would be at the risk of the defendant, and would not represent dollars, as credits usually do.

But the great fact in this circular is the same as the other; and that is, the defendant will be credited for the amount received on account of collections.

Soon after this circular, Mr. Dox, on the receipt of the funds from Cooley, Farwell & Co., and H. W. Hunt & Co., advised the defendant that its account had a credit of $2,000 in one case, and in the other $1,037.85, May 1st and 6th, 1861 (pages 12, 13).

Can it be said, consistent with reason and justice, that the defendant from this advice must have understood that the credit was a special deposit of so much long list bank paper which the witness, Dox, called currency, and that the defendant could only draw for funds of the same kind. If such was the understanding of the plaintiff, and good faith intended on its part, the advice ought to have stated that the amount of that credit could only be drawn for, payable in the long list of free bank paper, a portion of which other banks did not receive, for the reason it had no certain value.

It is impossible, we submit, for courts of justice to sustain such unjust doctrine as contended for by the plaintiff in error. To justify such wanton neglect of duty on the part of agents, it would overturn well settled rules of law and give a license to a bank to adopt such articles of commodity as currency as might meet its convenience, without regard to law or commercial usage.

The theory of the plaintiff in error is, that the banks which saw

authorized by the instructions, nor from any consent on the part of the defendant. Unauthorized acts of agent does not bind the principal.

Perkins vs. *Washington Ins. Co.*, 4 Cowen Rep., 645.
Batty vs. *Carswell*, 2 John. Rep., 48.
Munn vs. *Com. Co.*, 14 John. Rep., 48.
Beals vs. *Allen*, 18 John. Rep., 363.
Andrews vs. *Kneeland*, 6 Cowen Rep., 357.
Rossiter vs. *Rossiter*, 8 Wendell, 494.

4. The plaintiff having received depreciated paper without authority, and placed the same to the credit of the defendant as so much money, without notice to the defendant that uncurrent money had been received and would be held for its account, the relation of debtor and creditor thereby existed, and the plaintiff became liable for the amount of the credit, to recover which, an action for money had and received will lie.

Story on Bailment, sec. 88.
Commercial Bank of Albany vs. *Hughes*, 17 Wen., 100.
Smedes vs. *Bank of Utica*, 20 John., 370.
Chapman vs. *White*, 2 Seldon, 417.
Munn vs. *Burch*, 25 Ills., 35.
Mattee vs. *Franklin Bank*, 1 Paige, 249.
U. S. Bank vs. *Bank of Georgia*, 10 Wheaton, 343.
Keen vs. *Collin*, 1 Metcalf (Ky.), 415.
Bank of Ky. vs. *Wister*, 2 Peters, 318.

5. The plaintiff, by mixing the funds with its own, became a debtor to the defendant.

Case vs. *Abeel*, 1 Paige, 393, 402.
Wren vs. *Kirton*, 11 Vesey, Jr., 377.
Parson's Mercantile Law, 302.
In the matter of Stafford, 11 Barb., 354.
Marine Bank of Chicago vs. *Rushmore*, 28 Ills., 471.

The last case cited is one which arose in Chicago under the same state of the currency and condition of the country as the one now under consideration, in which the plaintiff in error was a party.

The same principle in law was then contended for, and by very able counsel on the part of the bank, as counsel now here contend. We, therefore, consider the case directly in point, and one presenting the true rule of law applicable in this case.

Perhaps we ought to notice the separate opinion of Chief Justice CATON in the case of the *Chicago Marine & Fire Insurance Co.* vs. *Keiron*, 27 Ills., 506, which was a case involving one of the points at issue here. The Chief Justice says, on page 507: "I "think it was competent to show by, parol proof on the trial, that "the terms 'currency,' or 'Illinois currency,' to pay which in "terms the promises were made, had a local signification well un- "derstood by all parties, and that they did not mean gold or silver "or their equivalent. The broad and comprehensive meaning of "the word 'currency' is such as to show that it may, with pro- "priety, be used in reference to things of different values when ap- "plied to a medium of exchange of property.

"Its primary signification is a passing or flowing. Something "which flows along or passes from hand to hand. When used in "reference to a circulating medium or a representative of values in "trade or commerce, it does not necessarily mean cash, but is "equally applicable to anything which is used as a circulating "medium and is generally accepted in trade as a representative of "values of property. Among many of the native tribes on the "headwaters of the Niger, a certain kind of shell called *kurdi* is "used as such currency or circulating medium, ordinarily about "2500 of which represent the value of a dollar; among others, "strips of cotton cloth are used as currency, and among many both "are used, as well as money.

"3 Bosth, 128."

We are not told by Chief Justice CATON that the native tribes on the head waters of the Niger, had at that time, any fixed legal standard of money. Crude shells may have been an article of exchange, with other tribes, for strips of cotton cloth, the same as the native tribes, upon the Western lakes, had articles of exchange for blankets. Such as skins and furs, which, according to ancient custom

among the tribes, had become a circulating medium — a something which passed from hand to hand.

We fail entirely to see how it is possible in Chicago, in a land of law and well-understood commercial usage, where the law regulates money, and authorizes the issuing of currency to represent money, that it is competent to prove by parol that currency means rags without any certain value.

Being satisfied the authority referred to by the Chief Justice will not be considered law, we will take no more time in this direction.

6. The plaintiff having received depreciated paper upon defendant's collections and credited the amount as so much money, without notifying the defendant of the condition of the paper received, the relation of debtor and creditor then existed, and the plaintiff became liable for the full amount of the credit, even though the amount received became valueless without its fault.

Marine Bank of Chicago vs. *Rushmore*, 28 Ills., 471.
Chapman vs. *White*, 2 Seldon, 417, GARDNER J.

Justice GARDNER says: "*Money deposited generally with a* "*banker becomes the property of the depository. The right of the* "*depositor is a chose in action.*"

Commercial Bank of Albany vs. *Hughes*, 17 Wend., 94.

NOTE. "When money paid into a bank is passed generally to "the credit of the owner, and not placed or received as a special "deposit, the bank do not hold the money as *bailers*, but the rela- "tion of debtor and creditor is created. * * * And if the "money be lost, though without the fault of the bank, the depos- "itor is entitled to payment."

COWEN, J., says: "*But I understand these deposits to create the* "*relation of debtor and creditor. The bank takes the money in the* "*nature of a gratuitous loan, and charges itself with a debt abso-* "*lutely due to the depositor. It is not a case of a technical bail-* "*ment. Should the money be lost without the fault of the bank, it* "*would be liable.*"

We submit, that the current of authorities are to the extent we claim, and that the plaintiff is clearly liable and without a shadow of excuse.

The third point made by defendant in error is, whether the court erred against the plaintiff in error in the instructions given to the jury. If there be error in the instructions complained of, it is impossible for us to see it, except as against the defendant in error.

It cannot be denied that generally, as stated by the court, a bank or other party receiving a note for collection, in the absence of instructions, express or implied, had no right to receive anything but good money or gold and silver in payment.

If there was authority, express or implied, to the plaintiff in error to receive depreciated currency of Illinois in payment, and to place the amount to the credit of defendant, in the usual way of doing business, to remain until called for by the defendant, and without other instructions the plaintiff did mix the funds so received with its own, as a part of its business and banking capital, then, in such case, the plaintiff would be liable for the value in coin of the currency received at the time of payment, with interest after demand; for the reason the plaintiff, by its own act, rendered it impossible to deliver the same funds, and by not taking a memorandum of the funds received, the value could not be arrived at; therefore, the defendant was not obliged to accept of the long list paper of the free banks of Illinois in case it had been offered at the time of the demand.

Mixing the defendant's funds with the funds of the plaintiff was an appropriation which rendered the plaintiff liable, whether there had been a credit on its books or not; consequently, the rule stated by the court was the true rule of law, if there had been any evidence in the case to go to the jury on the point of authority to receive depreciated paper.

But this instruction was qualified; the court distinctly stating that, "unless the jury believe from the evidence, that it was the agree-"ment, express or implied, of the parties that the loss by depre-

" ciation of such currency was at the plaintiff's risk, in which case " the plaintiff is only entitled to recover the value in coin of such " currency at the 'date of demand of payment' with interest " from the time."

Here the plaintiff in error had the full benefit of instructions in its favor, upon every imaginable forced construction possible to be put upon the circulars, the same as though it had been proven that the plaintiff had received the circulars and had consented to every word therein; and we might say the latent intent the writer had in getting up the circulars, as evidenced by the construction put upon them by the counsel, and failed for prudential reasons to express.

We think the plaintiff has no cause to complain for reason of the instructions given to the jury.

There is one other point made in the order of our argument, and and that is as to the instruction asked by the defendant below, and refused by the court.

We might content ourselves with the simple remark, that the instruction given substantially and quite as distinctly embraced the same points presented in the instruction asked, and for that reason the court properly refused to give the instruction. But we propose to consider this cause of error assigned for the reason, upon this, counsel hang all their hope.

In order to fully understand the request made by the plaintiff in error, it will be necessary to enquire what is the meaning of the words, as stated by Mr. Dox.

On page 20, fol. 41, Mr. Dox says: " The funds of the bank were " all kept together, including its own, those received on deposit, " and for collections; all went into one fund. * * * * The " defendant put the funds received on collections for plaintiff with " its own funds, in the usual way. * * * * The defendant " kept all funds together, as well those held by it for others, on de- " posit, or received from collections and its own. And from this " common fund it used indiscriminately whatever it had occasion " for in the daily transactions of business.

" When the collections for the plaintiff were made, credit was " given the plaintiffs, as was the usual practice, on the books of the " defendant, for the amount in dollars.

" This credit expressed the amount in dollars, which the defend- " ant had collected for plaintiff, which, at the different times of " collections, were worth from 90 to 95 cents on the dollar, in coin. " During the winter and spring months of 1861, and while the " notes of the Illinois and Wisconsin banks were used as currency, " the defendant, as well as other banks and bankers in Chicago, " sorted the currency, reserving the best, and paying out the poor- " est kinds, so that the latter class of bills were chiefly in use and " circulation."

We have repeated several items of Mr. Dox's testimony which refers to the plaintiff's manner of conducting business at that time, and its practice in regard to deposits.

If the words, " *as stated by Mr. Dox*," do not mean anything as to the credit, then they might as well have been omitted, for the reason the words, " *and to place the amount to the credit of the* " *plaintiff, in the usual way, to remain until demanded by the* " *plaintiff, then*, &c.," mean the same thing, without the words *as stated by H. W. Dox*, as with the use of those words.

It is possible counsel for plaintiff in error may contend that, the instruction asked included the right to mix, to pay out from the funds indiscriminately, and to assort the funds, as Mr. Dox stated to be the usual way of the plaintiff, as well as others. To authorize a credit, in the usual way, as stated by Mr. Dox, taking all he had said upon that subject, would give the plaintiff very great authority. It would enable the plaintiff to pay the depositor a bill worth 90 to 95 cents at the time of its receipt, for one dollar of credit on the books; and, more than that, it would give to the plaintiff, in April, 1862, at the time of the demand, the right to pay the defendant any bill of the value of forty-five cents within the long list, for one dollar of credit upon the books, and in that manner discharge the entire amount standing upon the books to the credit of the defendant in error.

Follow out the plaintiff's position a little further, and it would authorize the plaintiff to discharge its liability, in April, 1862, at the time of the demand, by paying the average value of the long list at the time of the demand, whether that value was then five cents on the dollar, or forty-five cents, as stated by Mr. Dox. If we are not mistaken, such was the position taken by the counsel, and we may expect the same here. We submit, if the court please, that no such doctrine can be successfully maintained in this case, and will here give a copy of the instruction as we read it, and as we think it should be understood.

" If the jury believe, from the evidence, that the defendant was " authorized by the plaintiff to receive, in payment of collections " for the plaintiff, the depreciated currency of Illinois, or bills is- " sued by the free banks of Illinois, and to place the amount to the " credit of the plaintiff, in the usual way (on the books of the de- " fendant for the amount in dollars, to remain until demanded by " the plaintiff, then the plaintiff is only entitled to recover of the " defendant the value, in coin, of such currency so received by the " defendant at the time of demand made for payment by plaintiff, " with interest from that date." (Page 21.)

We submit, may it please the court, that the words included in brackets are what Mr. Dox said in relation to the credit being given in the usual way, and that those are the only words which can be used to fill up the reference made, " as stated by W. H. " Dox." (Fol. 43.)

This being fair, and the only legitimate rendering of the instruction asked that can be given, we say that the record fails to show any testimony on which to base such an instruction; therefore, it was no error for the court to refuse to give it.

Chandler vs. *Van Raidee*, 24 Howard, 227.

In this case, Justice CAMPBELL, in delivering the opinion of the court, says:

" Whether there be any evidence, is a question for the judge; " whether there be sufficient evidence, is for the jury."

We think this rule of law goes further than the case referred to, and will exclude an instruction asked, if any part of it is based upon imagination, and not warranted by the proof. Counsel cannot seriously contend that there is any evidence authorizing the receipt of depreciated currency of Illinois, or bills of the free banks of Illinois. Neither of the circulars stated that funds received as currency, were at a discount. The letters acknowledging the payment of the notes and credits to the defendant, did not state that paper worth only 90 or 95 cents on the dollar, had been received in payment of the notes. On the contrary, advices were that the amount received had been placed to the credit of the defendant, and the amount of credit stated was dollar for dollar, without discount or depreciation, and without the least intimation of anything of the kind.

We submit, may it please the court, that there is no evidence in the record on which to base the instruction asked for by the plaintiff in error, therefore the court did not err in refusing it.

Respectfully submitted,

E. S. SMITH,

Attorney for Defendant in Error.